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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

SAFEWAY STORES, INC., *et al.*,
Petitioners,

v.

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 6, 1980

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, which is reproduced in Appendix A, has been reported. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). The District Court for the Northern District of Texas entered judgment in the case without issuing an opinion.

JURISDICTION

The judgment of the court of appeals, which is reproduced in Appendix B, was entered on August 17, 1979. On August 31, 1979, the court of appeals extended the time for filing a petition for rehearing until September 14, 1979. A timely petition for rehearing was denied on April 24, 1980. The order denying rehearing is reproduced in Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977), prohibits antitrust actions by indirect purchasers or sellers. The question presented is whether that rule may be altered to permit indirect plaintiffs to sue on the claim that the use of pricing formulas and the condition of the market cause them rather than direct purchasers or sellers to suffer injury.

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

INTRODUCTION

This case presents an important issue of public policy involving this Court's decisions in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Under those decisions, only the purchaser or seller who deals directly with an antitrust violator may recover damages, and violators may not resist liability by claiming that the direct purchaser or seller passed on his loss

to someone else. Those decisions establish a definite and easily applied rule that has streamlined the administration of antitrust cases.

The decision below abandons this Court's bright-line rule. Certiorari should be granted for three reasons. First, the decision below contradicts prior decisions of this Court. Second, the decision below conflicts with decisions of other courts of appeals. Third, the ruling below will have far-reaching adverse effects on the administration of the federal antitrust laws. It will compel litigation of those issues that the *Illinois Brick* rule precludes and will prevent courts and parties from determining quickly and confidently who may bring suit.

STATEMENT OF THE CASE

In the mid-1970's several hundred cattlemen (the respondents herein) filed suits, including industry-wide class actions, against 25 food retailers, a food wholesaler, a retailers' trade association, and a beef industry publication (the petitioners herein). The cattlemen alleged that the retailers had conspired to pay meat packers artificially low prices for dressed beef and that the packers had passed on to the cattlemen the impact of the alleged violation by paying the cattlemen low prices for live cattle.[1] The cattlemen did not claim that they sold any of their cattle directly to the retailers.

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[1] In 1976, the Judicial Panel on Multidistrict Litigation assigned the cattlemen's cases to the District Court for the Northern District of Texas. *In re Beef Industry Antitrust Litigation*, 419 F. Supp. 720 (J.P.M.D.L. 1976). Certain of the same cattlemen plaintiffs shortly thereafter filed new suits, including an industry-wide class action, against a number of the largest meat packers, alleging that the cause of depressed cattle prices was a conspiracy among the middleman meat packers. These cases were also transferred to the Northern District of Texas. *See In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170 (5th Cir. 1979), *petition*

On June 9, 1977, this Court decided *Illinois Brick*, which holds that only those persons who deal directly with alleged antitrust violators may recover in private treble-damage actions under Section 4 of the Clayton Act.[2] The cattlemen then amended their complaints. They alleged that, although they did not deal directly with the retailers, they nonetheless absorbed the effect of any low wholesale beef prices because short-run cattle supply is highly inelastic and meat packers use formulas based on the wholesale price of beef to determine the prices they pay for cattle.[3]

Petitioners moved for judgment on the pleadings, and the district court dismissed the complaints on the authority of *Illinois Brick*. The court of appeals reversed, holding that the allegations of the amended complaints stated claims on which relief could be granted. It ruled that the cattlemen were entitled to attempt to show that the packers passed back to them the alleged reductions in beef prices without regard to market forces, and it proposed that there be pretrial proof about these circumstances to determine whether the *Illinois Brick* rule applies.

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for cert. filed sub nom. Iowa Beef Processors, Inc. v. *Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214).

[2] This Court's prior decision in *Hanover Shoe* held that an antitrust defendant may not assert as a defense that indirect purchasers, rather than the direct purchaser bringing the suit, were the parties in fact injured by illegal overcharges. 392 U.S. at 491-94.

[3] The allegations made in the amended complaints were proffered for the purpose of curing any defects in plaintiffs' pleadings in light of *Illinois Brick*. Motion for Leave to File Amended and Substituted Complaint, MPIA Record at 824-25, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *HANOVER SHOE* AND *ILLINOIS BRICK*

The rule of *Hanover Shoe* and *Illinois Brick* is simple: "pass-on" claims or defenses are not permitted. The explicit intent of that rule is to remove the necessity of tracing effects of price and output decisions throughout a distribution chain.

This Court allows virtually no departure from its rule, except for the situation where the middleman has a pre-existing, fixed quantity, cost-plus contract that fully insulates him from all fluctuations in price and in supply or demand.[4] The court below reasoned that if a pass-on claim is appropriate in the case of a cost-plus contract, it should also be appropriate in other circumstances where it is claimed that a combination of pricing formulas and inelasticity preempt ordinary market forces.[5] This raises three issues for litigation before a court may resolve the propriety of applying *Illinois Brick* or *Hanover Shoe*:

(1) How elastic is supply or demand,

(2) To what extent does the middleman determine price by the use of formulas, and

(3) How much of a "collusively fixed price" does the middleman absorb and how much is passed on to others.

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[4] This Court has also suggested that a pass-on defense might be permitted where the middleman is owned or controlled by its customer. *See Illinois Brick*, 431 U.S. at 736 n.16.

[5] *Beef Industry*, 600 F.2d at 1163-64, App. A at 30a-33a.

This Court has foreclosed precisely the inquiries that the court below authorized. For example, where the court below invited plaintiffs to attempt to prove that the market exhibited "structural inelasticity of short term supply,"[6] this Court has refused to permit inquiries about market elasticity, holding that pass-on claims or defenses cannot be based on such proof.[7] And where the court below invited plaintiffs to try to show that meat packers (the middlemen in these cases) used formulas to calculate the prices they would pay for live cattle,[8] this Court has refused to permit an inquiry into the use of pricing formulas such as a "fixed percentage markup" or "cost-based rules of thumb."[9] The court below, by requiring factual inquiry into the extent of a middleman's absorption of loss, mandates just the inquiry that this Court has prohibited.[10]

The gap between the views of the court below and the holdings of this Court is demonstrated in the words of *Illinois Brick* itself:

> "Respondents here argue, not without support from some lower courts, that pass-on theories should be

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[6] *Id.* at 1166, App. A at 36a.

[7] *Illinois Brick*, 431 U.S. at 744.

[8] *Beef Industry*, 600 F.2d at 1165, App. A. at 34a-35a.

[9] *Illinois Brick*, 431 U.S. at 743-45. There is no room for the view of the court below that in *Illinois Brick* this Court refused to create an exception for fixed markups because it was skeptical about whether the markups were strictly applied. *Beef Industry*, 600 F.2d at 1165, App. A at 35a. In *Illinois Brick* this Court expressly rejected an offer to prove the strict application of a fixed markup. *Illinois Brick*, 431 U.S. at 742-43 n.26.

[10] *Compare Beef Industry*, 600 F.2d at 1165, App. A at 35a-36a, *with Illinois Brick*, 431 U.S. at 737, 741.

permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids. . . . Exceptions . . . have also been urged for other situations in which most of the overcharge is purportedly passed on. . . .

"We reject these attempts to carve out exceptions . . . for particular types of markets. . . .

"More generally, the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the . . . rule was meant to avoid." [11]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE THIRD AND FOURTH CIRCUITS

Both the Third and Fourth Circuits have specifically addressed—and rejected—efforts to expand the cost-plus contract rationale to authorize other types of pass-through claims and defenses.

In *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), indirect purchasers of bags brought suit against bag manufacturers alleging violations of the antitrust laws. Defendants obtained summary judgment on the basis of *Illinois Brick*. On appeal, plaintiffs contended that "it is sufficient . . . to prove that there were pre-existing cost-plus arrangements, and that it is not necessary . . . to prove that any such arrangements were reduced to a formal contract or that they were for fixed quantities of goods." [12]

The Third Circuit rejected that contention as "manifestly not in accordance with the dictate of *Illinois*

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[11] *Illinois Brick*, 431 U.S. at 743-45 (footnotes omitted).

[12] 596 F.2d at 580.

Brick." [13] Noting that courts are not free to "extend the exception beyond the limited circumstances recognized by the Supreme Court," the court refused to stretch the exception "to include informal arrangements and patterns of cost-plus pricing." [14]

The decision below is also in conflict with the Fourth Circuit's decision in *Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1021 (1980). In that case, gasoline retailers alleged a conspiracy to fix wholesale prices. Defendant, a wholesaler, attempted to assert a pass-on defense by arguing that wholesale and retail gasoline prices moved in fixed relation to each other, that the effect was the functional equivalent of a cost-plus contract between the plaintiffs and their customers, and that the plaintiffs had passed on any overcharge.[15] The Fourth Circuit held that an historical pattern or practice of cost-based pricing does not create an exception to *Illinois Brick*.[16]

III. THE DECISION BELOW RAISES AN ISSUE OF IMPORTANCE FOR THE ADMINISTRATION OF THE FEDERAL ANTITRUST LAWS

The rule in *Hanover Shoe* and *Illinois Brick* permits courts to determine quickly and confidently who may sue or assert a pass-on defense. The explicit purpose of the rule is to avoid

> "the uncertainties and difficulties in analyzing price and output decisions . . . [and] the costs to the judicial system and the efficient enforcement of the

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[13] *Id.*

[14] *Id.* at 577-78 n.9.

[15] 602 F.2d at 633.

[16] *Id.* at 633 & n.4.

antitrust laws of attempting to reconstruct those decisions in the courtroom." [17]

The only exceptions this Court recognizes are ones that can be established by simple, threshold evidence, without resort to analyses of price and output and the attendant uncertainty, difficulty, and cost.

The court below has created an amorphous new exception that requires proof of complex economic issues, including elasticity, formula pricing, and the impact of price changes. Measurement of elasticity of supply or demand is difficult or impossible even with the doubtful benefit of complex economic testimony.[18] And proof of adherence to formula pricing raises similarly difficult problems of theoretical analysis and factual proof.[19] To authorize the investigation of whether changes in price

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[17] *Illinois Brick*, 431 U.S. at 731-32 (footnote omitted).

[18] "[T]here remains a serious problem of measuring the relevant elasticities. . . . In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these concepts . . . it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." *Illinois Brick*, 431 U.S. at 742.

The court below expressly noted this Court's conclusion in *Illinois Brick* that measuring "relevant elasticities" is a "near impossibility." *Beef Industry*, 600 F.2d at 1163 n.19, App. A at 31a n.19.

[19] "Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. . . . These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. . . . The intricacies of tracing the effect of an overcharge on . . . prices, costs, sales, and profits thus are not spared the litigants." *Illinois Brick*, 431 U.S. at 744.

are passed through the distribution chain based on these, or similar factors, is to require precisely what *Illinois Brick* bars—"the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum . . . ." [20]

Moreover, the decision below ignores this Court's admonition that the application of its rule must not generate a series of complex factual contests to draw fine lines over economic issues.[21] The decision will require litigation whenever a party alleges formula pricing and high inelasticity. Formula pricing is commonplace, and inelasticity a matter of degree. Both involve matters of economic approximation and fine distinction, and both are easily alleged. The resulting litigation, ostensibly to determine application of the rule, will contest precisely those issues the rule proscribes.

This Court should reassert the rule of *Hanover Shoe* and *Illinois Brick* promptly and unequivocally. There are scores of antitrust cases that, like this matter, involve class actions with legions of named parties and potential claimants. Many, like the instant cases, are consolidated for pretrial purposes in circuits different from those in which they may ultimately be tried. The decision below opens a major conflict. If this Court allows the antitrust policy that was settled in *Hanover Shoe* and *Illinois Brick* to be reopened in pending and future antitrust cases, then new dimensions of complexity will be added to many of the almost 3,000 private antitrust cases now pending,

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[20] *Id.* at 744-45.

[21] "The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality." *Id.* at 745.

and the accomplishments of *Hanover Shoe* and *Illinois Brick* will be undone.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Aug. 17, 1979

Nos. 78-1817—78-1829

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET NO. 248

PONY CREEK CATTLE CO., INC., *et al.*,
Plaintiffs-Appellants

MUSSELMAN RANCH CO., ET AL., *et al.*,
Plaintiffs-Intervenors-Appellants

v.

THE GREAT ATLANTIC & PACIFIC TEA CO., *et al.*,
Defendants-Appellees

R. DIRK AGEE, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

MEAT PRICE INVESTIGATORS ASSOCIATION, ETC., *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

RICHARD S. LOWE, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

A. L. BLACK *et al.*,
Plaintiffs-Appellants

v.

ALBERTSON'S, INC., *et al.*,
Defendants-Appellees (two cases)

CHAPARRAL CATTLE CORP., *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

BURKE PETERSEN, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

RONALD BECKER, *et al.*, on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

JOHN O. VARIAN *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

MEAT PRICE INVESTIGATORS ASSOCIATION *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., ETC., *et al.*,
Defendants-Appellees

LITTLE RANCH CO., INC., *et al.*,
Plaintiffs-Appellants

v.

THE NATIONAL ASSOCIATION OF FOOD CHAINS, ETC., *et al.*,
Defendants-Appellees

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Plaintiffs-Appellants

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James F. Rill, Martin A. Rosen, Collier, Shannon, Rill, Edwards & Scott, Washington, D.C., John L. Hauer, Richard C. Levin, Akin, Gump, Hauer & Feld, Dallas, Tex., for The Nat. Ass'n of Food Chains.

Jeffrey S. Davidson, Fred H. Bartlett, Jr., Daniel Edelman, Kirkland & Ellis, Chicago, Ill., for Nat. Provisioner, Inc.

Franklin P. Auwarter, Kenneth J. Jurek, Mayer, Brown & Platt, Chicago, Ill., for National Tea Co.

Peter D. Standish, Weil, Gotshal & Manges, New York City, for Pueblo Intern., Inc.

Les J. Weinstein, Aaron M. Peck, McKenna & Fitting, Los Angeles, Cal., for Ralph's Grocery Co.

Richard W. Odgers, John B. Bates, Pillsbury, Madison & Sutro, San Francisco, Cal., W. B. West, III, William F. Carroll, Clark, West, Keller, Sanders & Butler, Dallas, Tex., for Safeway Stores, Inc.

Michael R. Murphy, Donald B. Holbrook, Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for Skaggs Companies, Inc., Skaggs-Albertson's.

Robert D. Paul, Goodwin, Proctor & Hoar, Boston, Mass., Stanley E. Neely, Locke, Purnell, Boren, Laney & Neely, Dallas, Tex., for The Stop & Shop Companies, Inc.

Geoffrey M. Kalmus, Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, New York City, T. L. Caudle, III, Coke & Coke, Dallas, Tex., for Supermarkets General Corp.

Michael E. Bress, Dorsey, Windhorst, Hannaford, Whitney, Halladay, Mineapolis, Minn., for Super Valu Stores, Inc.

Timothy J. Sargent, Bodkin, McCarthy, Sargent & Smith, Los Angeles, Cal., for Thriftmart, Inc.

Ronald L. Olson, Munger, Tolles & Ricker-Hauser, Los Angeles, Cal., for Vons Grocery Co.

Chester Bedell, John A. DeVault, III, Charles P. Pillans, Bedell, Bedell, Dittmar & Zehmer, Jacksonville, Fla., Charles P. Storey, John K. DeLey Jr., Storey, Armstrong, Steger & Martin, Dallas, Tex., for Winn-Dixie Stores, Inc.

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, HILL, and FAY, Circuit Judges.

WISDOM, Circuit Judge:

These consolidated appeals involve the applicability of *Illinois Brick Co.* v. *Illinois*, 1977, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, to sales by primary producers to middlemen at prices allegedly depressed by price-fixing at the retail level of distribution. The appeals also present other difficult questions concerning federal antitrust laws.

These appeals arise from thirteen private antitrust actions alleging that the concerted activities of the defendants violate the provisions of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. The complaints ask for treble damages and for injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U.S.C. 15 and 26. The plaintiffs are cattlemen, ranchers, and feeders. The defendants are twenty-five retail food chains, a wholesale grocer, the retail chain's national trade association, and a beef industry price reporting publication.[1]

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[1] The lawsuits involved in this appeal are: *Petersen et al.* v. *Safeway Stores, Inc., et al.; Pony Creek Cattle Co., et al.* v. *The Great Atlantic & Pacific Tea Co., et al.; Lowe, et al.* v. *Safeway Stores, Inc., et al.; Meat Price Investigators Ass'n et al.* v. *Safeway Stores, Inc., et al.; Shoshone Tribe of Duckwater, et al (formerly styled Agee, et al.)* v. *Safeway Stores,*

The plaintiffs in the various suits charge that the retail chains combined, primarily by using the trade association and the price reporting publication, to fix at artificially low levels the prices at which beef is purchased from slaughterhouses and meat packers, and ultimately from the producers—cattle ranchers and feeders. The resulting depression in wholesale prices to retailers, passed up the chain of distribution, reduced the prices which the plaintiffs received in selling their cattle to the packers and slaughterhouses.

The Judicial Panel on Multidistrict Litigation assigned the cases to the District Court for the Northern District of Texas, for coordinated or consolidated pretrial proceedings. *In re Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (Jud.Pan.Mult.Lit., 1976). In June 1977 the Supreme Court handed down its decision in *Illinois Brick*, holding that a purchaser could not maintain an antitrust damage action against a seller remote from him in the chain of distribution; rejecting, with narrow exceptions, the offensive use of "passing-on".[2] Shortly thereafter the defendants moved for dismissal of the complaints on the

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Inc., et al.; Black, et al., v. *Acme Markets, Inc., et al.; Chapparal Cattle Corp., et al.* v. *Safeway Stores, Inc., et al.; Becker, et al.* v. *Safeway Stores, Inc., et al.; Varian, et al.* v. *Safeway Stores, Inc., et al.;* and *Little Ranch Co., et al.*, v. *The National Association of Food Chains, et al.*

[2] "Passing-on" usually means the process whereby a middleman in the chain of distribution who has been overcharged by a manufacturer or by a producer adjusts his prices upward in sales to a lower level in the chain to reflect overcharge. This case presents the converse of that situation. Here the passing-on was the result of alleged depressed prices fixed by retailers and imposed upon the middlemen (slaughterhouses and packers). In turn, the middlemen passed-on the undercharge, the depression in prices, to the primary producers (cattle ranchers and feeders).

ground that the plaintiff's theory of damages (sellers suing remote purchasers) was a "pass-on" theory indistinguishable in all important respects from the theory of damages (purchasers suing remote sellers) at issue in *Illinois Brick*. The district court agreed with the defendants and dismissed the complaints with prejudice for failure to state claims upon which relief could be granted. The court did not file an opinion, but stated from the bench that the dismissal was based on *Illinois Brick*.

The main issue is whether the complaints should have been dismissed on the strength of *Illinois Brick*. The plaintiffs/appellants also urge the district court erred in striking from the complaints allegations of retail price-fixing. The plaintiffs in *Pony Creek Cattle Co., Inc., et al.* v. *The Great Atlantic & Pacific Tea Co., et al.* appeal partial summary judgments granted against them on their allegation that the statute of limitations was tolled because the defendants fraudulently concealed the alleged conspiracy. We agree with the defendants-appellees that the claims for damages, as pleaded, are within the ambit of the rule of *Illinois Brick*. Nevertheless we reverse and remand in all thirteen cases because the complaints state claims for damages within the "cost-plus" exception to the *Illinois Brick* bar. We reverse the partial summary judgments entered on the issue of fraudulent concealment in *Pony Creek*. In the *Agee* and *Varian* cases, we reverse the district court's order striking the allegations of retail price-fixing. In addition, we hold that the complaints in all the cases state claims for injunctive relief under section 16 of the Clayton Act.

I.

These actions were dismissed on the pleadings. The allegations of the complaints therefore are taken as true for purposes of these appeals.

The plaintiffs are all cattle ranchers or feeders or both. Cattle are bred and raised on farms, ranches, and commercial feedlots. The animals are fattened for slaughter by feeding them a concentrated ration for fast growth. Ranchers either fatten the cattle themselves or sell to or place the livestock with feeders for fattening. Most fat cattle, say the plaintiffs-appellants, are purchased by slaughterhouses and packers directly from the ranchers and feedlots, although some are purchased by the slaughterers through auction markets. The cattle are then slaughtered and most of the beef is sold as either boxed or carcass beef to retail and wholesale grocers. The large retail food chains buy most of their beef directly from slaughterers and packers. The complaints do not allege a conspiracy between the slaughterers and packers and the defendants.

The plaintiffs allege that the wholesale or carcass price of beef, the price paid by the retail chains to packers and slaughterers, is established by the large retail chains acting in concert. For any given week, it is alleged, the wholesale price in a given area of the United States is set by the pricing decision of the A & P or Safeway Stores, Inc. or the Kroger Co. or one of the other defendants. In antitrust jargon, each wields monopsony power in its region or, with others, oligopsony power.[3] One designated retail chain in a given area will buy its beef in the regional wholesale market early in the week. The pricing decisions of the leading purchasers in the various regions of the nation are reported in the National Provisioner Daily Market and News Service, ("National Provisioner") or "Yellow Sheet", and thus become known to the entire wholesale beef trade. The other retail chains,

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[3] We use the term "monopoly" to refer to price-fixing by sellers; "monopsony" and "oligopsony" to refer respectively, to price-fixing by a single purchaser or by a group of purchasers, that is, the retailers/defendants in this case.

it is alleged, then follow the price established by the regional leader in purchasing their requirements of beef for the period. The chains, according to the complaints, can dictate the wholesale price to the packers because they wield monopsony or oligopsony power and because the packers have no long-term storage facilities and therefore cannot withhold their product.[4] The chains' power is augmented by their considerable cold-storage capacity: they can blunt price rallies by abstaining from the wholesale market and working from their stockpiles.

The price depressions thus engineered are directly "passed on" to the ranchers and feeders, according to the complaints. The plaintiffs allege that the cattlemen, like the slaughterers and packers *vis-a-vis* the chains, are in no position to negotiate prices because they cannot, at least in the short term, withhold their product. A fattened steer or heifer, the complaints allege, must be sold within three weeks of the time it reaches choice grade. If the animal is not sold in that time it becomes overfattened and hence less valuable. The supply of fat cattle is therefore inelastic in the short term. The cattlemen contend that they must take the price the packers quote. The packers, according to the complaints, bid prices derived directly from the Yellow Sheet (or, west of the Rockies, the Safeway) carcass price. Working from estimates of the percentage of an animal that will be carcass beef salable to the retail chains, the packers pay cattle prices based on the Yellow Sheet prices.[5] Thus, the al-

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[4] Chainwide pricing decisions for a given region are made possible, according to the allegations of the complaints, by the chain's centralized buying practices. Purchases are made for an entire chain or for a large part of a chain, it is alleged, from a central location.

[5] As explained in Paragraph 28 of the Amended and Substituted Complaint in the *Meat Price Investigators Association* ("*MPIA*") suit:

legedly artificially low wholesale prices established by the retail chains' combination translate directly into artificially low prices for fat cattle.

The plaintiffs do not know when this alleged conspiracy began, but contend that it has been in operation since 1963 at the latest. The food chain defendants, according to the complaints, coordinate their efforts through meetings conducted by the National Association of Food Chains. The conspirators allegedly effect their price-fixing schemes by allocating to dominant chains geographical areas in which to exercise price leadership, and by controlling or manipulating the "Yellow Sheet". The elimination of price competition is further assured by alleged agreements concerning the conspirators' respective specifications for beef. The plaintiffs charge that the chains in any given region coordinate their specifications so that the chains do not compete with each other in purchasing beef of their respective specifications.

The complaints were filed in 1975. The cattlemen charge that the scheme violates section 1 of the Sherman Act, because it is a scheme "in restraint of trade and commerce". They also contend that the scheme was "an attempt to monopolize" and had the effect of monopolizing the wholesale beef market in violation of section 2 of the Act. The complaints also allege that the retail chains fix the retail price of beef to consumers. They request injunctive relief, under section 16 of the Clayton Act, and treble damages going back to the beginning of the alleged conspiracy. The Clayton Act's four-year statute of limitations would ordinarily operate to limit recovery to dam-

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Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

ages accruing within four years of the filing of the complaints.[6] The plaintiffs, however, urged that the defendants and their co-conspirators frudulently concealed the conspiracy from the beginning, and that the statute of limitations therefore did not begin to run until the plaintiffs discovered, in July 1974, that the alleged conspirators had indeed met to discuss the pricing of beef.[7]

In late 1975, before the instant actions were consolidated in the Northern District of Texas, that court entered partial summary judgments in the *Pony Creek* case, a suit originally filed in the Northern District of Texas, dismissing with prejudice the *Pony Creek* plaintiffs' claims for damages that accrued prior to June 5, 1971. In December of 1976, following the consolidation of the various actions in the Northern District of Texas, the defendants filed motions for partial summary judgment on the statute of limitations issue in the remaining suits. The district court denied those motions. The *Pony Creek* plaintiffs filed a motion to vacate the earlier partial summary judgments entered against them, but the district court has not acted on that motion.

In June 1977 the defendants in all the cases filed a joint motion for judgment on the pleadings based on the Supreme Court's opinion in *Illinois Brick*. They pointed

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[6] Section 4B of the Act, 15 U.S.C. § 15b, states, in relevant part:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

[7] That information was allegedly disclosed during discovery in *Bray, et al.* v. *Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975), a suit virtually identical to the instant actions brought by California cattlemen against many of the defendants in these cases.

out the absence of any allegations that the plaintiffs had sold cattle directly to the defendant retail chains. The suits, they contended, were therefore barred by the general rule of *Illinois Brick* that only those parties who have dealt directly with members of a price-fixing conspiracy can maintain an antitrust action for damages against the price-fixing. The plaintiffs asked the district court to stay its ruling on the defendants' motion pending further discovery. Six months later, in December, 1977, the district court entered its order dismissing twelve of the suits for failure to state claims and striking the allegations of retail price-fixing. The court dismissed the remaining case—the *Little Ranch* case—in February 1977. All the cases were dismissed with prejudice.

II.

We address first the most important issue in these appeals: Did the district court err in dismissing the appellants' claims for damages?

A.

We meet at the outset questions about the applicability of *Illinois Brick* to these actions. The appellants' first line of attack on the district court's decision is the bold argument that *Illinois Brick* simply has no application to these actions. They also urge that, assuming *Illinois Brick* is relevant, the decision cannot bar damage claims against the National Provisioner and the grocery chain trade association because neither is a buyer or seller of beef. In the interests of clarity, our assessment of these contentions will begin with a discussion of the background and rationale of the *Illinois Brick* decision.

The *Illinois Brick* rule barring damages actions against alleged price-fixers by indirect purchasers has its genesis in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 1968, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231.

Hanover Shoe involved an antitrust treble-damages suit under § 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a lessee of the machinery. The plaintiff claimed damages arising from the defendant's practice of leasing, rather than selling, the machinery, a practice that the plaintiff contended was a violation of section 2 of the Sherman Act. The Supreme Court affirmed the trial court's refusal to permit the defendant to prove up the defense that any illegal overcharges imposed on the lessee shoe manufacturer had been passed on to that manufacturer's customers. The Court referred to a "general tendency in the law" not to trace damages "beyond the first step". 392 U.S. at 488 n.6, 88 S.Ct. 2224, n.6 (quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 1918, 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451).[8] The Court rejected the defendant's argument that the general rule should admit of an exception when economic circumstances are such

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[8] Before *Illinois Brick*, a strong case could have been made that the *Hanover Shoe* decision rested primarily on the Court's perception that the middleman, and not the remote purchaser, is the likeliest enforcer of the antitrust laws. Although it is probable that Hanover, like most middlemen, passed on much of the overcharge, recognition of a passing-on defense would have reduced the incentives for middlemen to sue. Professor Posner has observed: "The choice was thus between overcompensating Hanover and underdeterring United. The Court's preference for the former is consistent with the view that the primary purpose of antitrust damage actions is to deter violations of law." R. Posner, *Antitrust Cases, Economic Notes and Other Materials* 149 (1974). *See Illinois Brick*, 431 U.S. at 752-53, 97 S.Ct. 2061 (Brennan, J., dissenting).

In *Illinois Brick*, however, the Court observed that the *Hanover Shoe* decision rested primarily on the difficulty-of-proof problem, and not on the deterrence rationale. *Illinois Brick*, 431 U.S. at 732 n.12, 97 S.Ct. 2061 n.12.

that the overcharge to the buyer both caused and enabled the buyer to pass on the full overcharge to his customers. The impact of the overcharge on the buyer's pricing decisions, said the Court, cannot be demonstrated with any precision in the ordinary case. 392 U.S. at 492-93, 88 S.Ct. 2224. Recognition of a general passing-on defense would, in the Court's opinion, simply encourage defendants to attempt to establish its applicability, thus complicating and protracting many antitrust proceedings. *Id.* at 493, 88 S.Ct. 2224. The Court rejected the passing-on defense as a general matter and expressed its view that the defense should be permitted only in certain narrow circumstances when the concerns underlying its rejection in *Hanover Shoe* were not present. *Id.* at 494, 88 S.Ct. 2224.

Hanover Shoe barred defensive passing-on, the use of passing-on as a defense in an antitrust action. In *Illinois Brick*, the Court resolved a split of authority in

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[9] Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in the company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

392 U.S. at 492-93, 88 S.Ct. at 2231.

the courts of appeals by ruling that, with few exceptions, indirect purchasers of an alleged price-fixer's product cannot maintain a treble damages action predicated on the offensive use of the theory that the price-fixer's overcharge to his customer was passed on to the plaintiffs. The plaintiffs were separated from the price-fixing offenders by two intervening transactions: the bricks moved from the manufacturers through subcontractors and general contractors to the consumers, carrying a four-cent-per-brick overcharge each time the brick changed hands. The court decided that if *Hanover Shoe* were to be followed, offensive as well as defensive use of passing-on must be barred. The Court noted that recognition of a "one-sided" limitation on a passing-on theory of damages would lead to a "serious risk of multiple liability". If offensive use of passing-on were permitted, a price-fixer could be held liable to an indirect purchaser for the amount of the overcharge passed-on to that purchaser by the price-fixer's direct customer yet, lacking a passing-on defense (under *Hanover Shoe*), would be liable to the direct purchaser, his customer, for the full amount of the overcharge.[10] Further, the Court concluded that

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[10] A serious risk of overlapping liability would remain even under a rule permitting the offensive use of passing-on only in situations in which the defendant could use a passing-on defense, unless the scope of passing-on were narrowly restricted to cases in which the incidence of overcharges could be established with certainty. That risk would arise from the risk of inconsistent factfindings in separate lawsuits by direct and indirect purchasers. Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 319 n.43 (1978). The magnitude of that risk would vary directly with the speculativeness of the proof of the incidence of the overcharge. By narrowly limiting the use of passing-on to cases in which the overcharge can be traced with ease and certainty, see part II, B of this opinion below, the Supreme Court has all but eliminated this risk of duplicative liability.

the rationale of *Hanover Shoe* had not depended on the defensive context in which passing-on was asserted in that case. The "uncertainties and difficulties in analyzing price and output decisions" in the real world, 431 U.S. at 731-32, 97 S.Ct. at 2068, the "principal basis" for the *Hanover Shoe* holding, *id.* at 731, 97 S.Ct. 2061, counseled rejection of offensive passing-on as well. Those same "evidentiary complexities and uncertainties" and undesirable delays would attend the effort of indirect purchasers to establish that illegal overcharges were passed on to them. *Id.* at 732, 97 S.Ct. 2061. The Court decided, therefore, that the passing-on theory of damages must be barred in those situations in which the defendant could not assert a passing-on defense against his direct purchasers. *Id.* at 735-36, 97 S.Ct. 2061.

Because *Illinois Brick* adopted a unified "mutuality" approach to passing-on problems we must reject the appellants' argument that *Illinois Brick* has no application to these suits insofar as they seek relief for violations of Section 2 of the Sherman Act. Under *Illinois Brick*, the plaintiffs would be entitled to urge a pass-on theory of damages only if the defendant retail chains could use a passing-on defense to claims brought by the packers and slaughterers. Whether the plaintiffs can proceed on a passing-on theory of damages is, applying the mutuality principle, a question unaffected by their denomination of the claim. Absent exceptional circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense.

The appellants' most ambitious contention is that *Illinois Brick* is entirely inapposite to price-fixing suits brought by sellers against indirect purchasers. They point out that *Illinois Brick* involved purchasers who charged price-fixing by a remote seller and contend that *Illinois Brick* should be limited to that type of case

because the harm suffered by sellers in cases such as this one is much greater than the harm suffered by indirect purchasers in the paradigmatic *Illinois Brick*-type case. Especially is this so, they urge, when, as here, the alleged price-fixing conspiracy stands like a tollgate athwart the powerful "middle position" in the beef marketing system. The cattlemen's argument, we take it, is that the serious harm flowing from monopsony or oligopsony price-fixing at a middle tier in an industry's structure outweighs the considerations, avoidance of overlapping liability and concern about complexities and uncertainties of proof, that underlay *Illinois Brick*—concerns that the Court may have overemphasized. *See* The Supreme Court, 1976 Term, 91 Harv.L.Rev. 70, 221-31 (1977).

The first step in assessing this argument is to examine the claim that the harm engendered by monopsony or oligopsony pricing of the kind alleged is, as a categorical matter, greater than that engendered by monopoly pricing. We focus first on monopsony or oligopsony pricing in general, without regard to the position occupied by the price-fixing combination in the productive chain. On this point, the appellants' contentions center on the harm suffered by the competitors themselves—the sellers. In the case of monopoly price-fixing, they say, the damaged buyer has a choice: he can refuse to buy the affected product and buy, instead, a substitute. In the monopsony or oligopsony price-fixing case, however, the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all. In their case, say the cattlemen, this means destroying fat cattle or, in the long run, cutting back production or going out of business.

We might acknowledge the difference as a general matter, but we have no reason to believe that the damage caused by the typical monopsony or oligopsony price-

fixing scheme is significantly greater than that caused by the usual seller price-fixing scheme. Both types of price-fixing are attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses.[11] The appellants argue that the reallocation process in the monopsony price-fixing case is inherently more likely than in the monopoly price-fixing case to cause business failures.[12] Assuming this to be

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[11] *See generally* J. Hibdon, *Price and Welfare Theory* 244-53 (Monopoly pricing); 264-67 (Monopsony) (1969); K. George & J. Shorey, *The Allocation of Resources* 150-52 (1978).

[12] In the case of monopoly price-fixing, the price-fixing generally raises the price of all goods that incorporate the product subject to the price-fixing. If the conspirators sell directly to the consuming public, the only businesses adversely affected are those in industries that supply complementary goods. If the conspirators do not sell directly to the consuming public, then the product is but an input in the production of other goods or services. By raising the cost of that input, the price-fixing conspiracy might conceivably have the effect of driving marginal firms that use the input out of the market. The likelihood of this occurring depends upon the magnitude of the cost of the input relative to the purchasing firm's total costs of production and on the elasticity of demand for the firm's product. A fifteen percent rise in the cost of beef, for example, threatens the profitability of a steakhouse far more than that of a grocery store. The impact will be greatest in the rare case of a firm that simply buys and resells only the good affected by the price-fixing conspiracy.

Most firms that sell directly to the typical monopsony or oligopsony price-fixing conspiracy, however, are in a position analogous to that of the single-product distributor who purchases his product from price-fixing conspirators. The good affected by the price-fixing conspiracy is likely to be the seller's only product or to represent a significant percentage of the seller's output. In general, the impact on a firm's reve-

true, *arguendo*, we do not think that this distinction is sufficient to warrant disparate treatment of monopoly and oligopsony for purposes of pass-on problems. If the *Illinois Brick* decision is grounded on a balancing of the deterrence and compensation policies of the treble-damages action against considerations of judicial economy and fairness to defendants—a view of *Illinois Brick* that is crucial to the appellants' argument [13]—it seems to us that the Supreme Court chose to permit entire price-fixing schemes, in some circumstances, to go unremedied by private damage actions. If the Court felt that competing considerations outweigh the costs of leaving unremedied the totality of harm flowing from some monopoly price-fixing schemes, we find it difficult to believe that the incremental harm, in the form of possible business failures, that might flow from unremedied monopsony or oligopsony price-fixing schemes would tip

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nues of a purchaser price-fixing scheme aimed at the product it sells is greater than the impact on a firm's costs of a monopoly price-fixing scheme affecting an input into the firm's product.

[13] If *Illinois Brick* did not involve such a balancing, even implicitly, then the appellants' argument that the greater harm flowing from purchaser, as compared with seller, price-fixing, justifies special treatment of passing-on problems in monopsony cases loses its premise. Formally, at least, *Illinois Brick* involved no such balancing as suggested in the text. The *Illinois Brick* holding is essentially the rule of mutuality. That rule was justified almost entirely by reference to the problem of overlapping liability, and the Court's focus on the risk of overlapping liability was a result of its assumption that direct purchasers, as well as indirect, would likely sue the price-fixers. On the surface of it, then, *Illinois Brick* does not acknowledge that its pass-on rule involves any significant sacrifice of antitrust enforcement: in those cases in which the rule bars indirect purchasers from suing, the direct purchasers, it is assumed, will likely come to the fore.

the Court's balance in favor of enforcement in the purchaser price-fixing case. The increment is too insignificant in comparison with the total damage caused by price-fixing.

The appellants urge that the Supreme Court has recognized that conspiracies aimed at sellers are especially abhorrent. None of the cases they cite, however, establish anything more than the unsurprising proposition that producers damaged by anti-competitive schemes have a remedy under the antitrust laws.[14] As support for their contention that conspiracies at the strategic middle position or "bottleneck" in an industry's structure are especially disfavored, they cite the Supreme Court's decisions in *American Tobacco Co.* v. *United States*, 1946, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575, and *Standard Oil Co. of New Jersey* v. *United States*, 1911, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619. Those decisions, it is true, recognize the seriousness of monopsony or oligopsony at the dominant middle of an important industry's productive chain, but they do not single out that situation for special treatment under antitrust laws. We cannot carve from an important antitrust rule intended to be of general application exceptions based on the sheer magnitude or impact of the particular conspiracy alleged.

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[14] *E.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 1969, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; *Continental Ore* v. *Union Carbide & Carbon Co.*, 1962, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777; *Klor's, Inc.* v. *Broadway Hale Stores, Inc.*, 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741; *Mandeville Island Farms* v. *American Crystal Co.*, 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328. The cases cited by the appellants, with the exception of *Mandeville Island Farms*, were cases involving monopolization or exclusionary practices, not price-fixing. None involved passing-on theories of damage.

We conclude that there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases.

A final issue as to the applicability of the *Illinois Brick* rule concerns the appellants' cases against the National Provisioner and the National Association of Food Chains. The appellants argue that the *Hanover Shoe-Illinois Brick* limitations on the use of passing-on theory apply only to suits brought against firms that are in the chain of production. They theorize that the "central rationale" of the *Hanover Shoe* and *Illinois Brick* decisions is that firms dealing directly with the alleged price-fixer are likelier than firms remote in the productive chain to sue and that severe limitations on the use of passing-on theory are necessary lest direct-dealing firms be discouraged from bringing suit. Because the trade publication and the trade association do not buy or sell beef at all, the argument continues, there are no firms in the beef marketing system that deal dirctly with these defendants. The cattlemen, the appellants conclude, are as likely as anyone to bring suit against those defendants.

The argument rests on a faulty premise. The *Illinois Brick* decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing-on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory. The complaints in these cases do so. The National Provisioner and the National Association of Retail Chains do not buy or sell beef but the appellants' complaints charge that they conspired with firms that do buy beef to fix the purchase price of boxed and carcass beef. That

the trade publication and trade association defendants do not market beef does not diminish the problems of overlapping liability and uncertainty of proof posed by the use of a passing-on theory of damages. The doctrine of *Illinois Brick* therefore applies to the complaints against these two defendants.

B.

Having determined that the *Hanover Shoe-Illinois Brick* doctrine applies to the damages claims in their entirety we turn to the appellants' contentions that these actions fit recognized exceptions to the bar against use of passing-on theory.

1. *The Co-Conspirator Exception.*

Certain of the appellants contend that the complaints in these actions, liberally construed, alleged a conspiracy between the retail chains, on the one hand, and the packers and slaughterers on the other.[15] They argue for

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[15] Indeed, many of the allegations strongly suggest that all the non-defendant co-conspirators adverted to in the complaints are food retailers. Paragraph 34 of the MPIA Amended and Substituted Complaint, for example, states in part:

> b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied . . . thus eliminating competition between and among the defendants and other co-conspirators.
>
> c. The defendant food chains and other co-conspirators have allocated retail marketing areas . . ..
>
> d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale . . ..
>
> e. . . . Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef

an exception from the *Illinois Brick* rule for cases involving a conspiracy between the remote price-fixers and the direct-dealing intermediary.

They argue, first, that cases involving conspiracy spanning two levels in the chain of distribution fit the exception recognized in *Illinois Brick* for cases in which the defendant owned or controlled its customer (the middleman). *Illinois Brick*, 431 U.S. at 736 n.16, 97 S.Ct. 2061 n.16.[16] If the retail chains conspired with the packers and slaughterers, they urge, the retailer can be said to have "controlled" the middleman within the meaning of footnote 16 of *Illinois Brick*. Market forces would have been superseded in such circumstances. There would then be no indirect dealing problem, it is argued, since those selling to the packers and slaughterers would have dealt directly with the price-fixing conspiracy.

Even if proof of a multilevel conspiracy would not bring the case within the "control" exception recognized in *Illinois Brick*, it is urged, we should recognize a distinct exception for vertical conspiracies. The appellants

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market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the 'Safeway price,' and which prices are directly passed on to the beef producer.

[16] "Another situation in which market losses have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. *Cf. Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, [at] 197, 199." But "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants". The Supreme Court, 1976, 91 Harv.L.Rev. 70, 230 (1977).

argue that the defendants remote from the plaintiffs in the chain of distribution do not run the risk of double liability if it is proved that the intermediary was an equal participant in the price-fixing conspiracy, for the co-conspirator intermediary could not recover in a suit against the remote seller or purchaser. This is so, they say, because "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other". *Columbia Nitrogen Corp.* v. *Royster Co.*, 4 Cir. 1971, 451 F.2d 3, 15. *See also Premier Electrical Constr. Co.* v. *Miller-Davis Co.*, 7 Cir. 1970, 422 F.2d 1132, *cert. denied*, 1970, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58.

As the appellees point out, however, the co-conspiracy theory now urged by the plaintiffs-appellants was not set forth in the complaints. The theory of the complaints, both before and after the *Illinois Brick* decision, was that the defendants conspired to fix the prices paid to packers and that the packers simply "passed on" the price depression to cattlemen. Certain allegations in the complaints refer to unnamed co-conspirators, and the appellants now contend that the packers and slaughterers are included among those unnamed co-conspirators. Various paragraphs in the complaints refer to the unnamed co-conspirators as nondefendant food retailers. Nothing in the complaints, however, suggests that packers or other intermediaries conspired with the defendants. In their joint reply brief the appellants cite paragraph 34 of the *MPIA* and *Becker* Amended Complaints as an example of a packer conspiracy allegation.[17] That paragraph, how-

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[17] That paragraph states:

> Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quan-

ever, states merely that most slaughterers and packers have standing agreements with the defendant chain stores to supply fixed quantities of beef each week, and that the Yellow Sheet or "Safeway" price paid the packers sets the price that the packers pay the plaintiffs for their cattle. This is merely an allegation of passing-on, not of conspiracy. No agreement to fix prices is alleged. If the act of passing-on sufficed to brand the intermediary as a co-conspirator the asserted exception would wholly swallow the *Hanover Shoe-Illinois Brick*, rule.

The appellants urge that the district court abused its discretion by failing to give them adequate opportunity to amend their complaints, after the *Illinois Brick* decision, to allege a vertical conspiracy, and by denying post-judgment requests for leave to amend. We do not agree.

Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as the result of rulings on a point of law handed down during the pendency of the litigation. *E.g., Commissioner of Internal Revenue* v. *Estate of Donnell*, 5 Cir. 1969, 417 F.2d 106. In none of these cases, however did the district court before the entry of its dismissal order deny the plaintiffs leave to amend their complaints in light of *Illinois Brick*. And all plaintiffs had a reasonable opportunity to amend before the district court ruled on the defendants' dismissal motions. Those motions, based on *Illinois Brick*, were filed on July 17, 1977, eight

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tities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway Price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

days after the Supreme Court's decision. The district court did not rule on the motions until October, 1977. In three of the suits, the *MPIA*, *Becker*, and *Petersen* suits, the complaints were amended, with leave of court, after the filing of the defendants' motions to dismiss. None of those complaints, however, adequately alleged conspiracy. The plaintiffs in the remaining suits stood on the allegations of their complaints, asserting that the "unnamed" co-conspirators mentioned therein were indeed packers and slaughterers. Following the court's communication of its decision to the parties, an attorney for one of the plaintiffs requested that the dismissal be "without prejudice", but none of the plaintiffs attempted to amend the complaints until the *Black* and *Pony Creek* plaintiffs, *after* the court's December 9 entry of its order dismissing the suits with prejudice, filed motions for leave to amend.

The district court did not abuse its discretion in denying the post-judgment motions for leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure requires that leave to amend be freely granted "when justice so requires". The Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman* v. *Davis*, 1962, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222. The plaintiffs have offered no credible explanation for their failure to move for leave to amend until nearly five months after the defendants moved for dismissal on the basis of *Illinois Brick*.[18] Absent any apparent justification for this delay, we cannot hold that the district court abused its discretion. We emphasize, moreover, that these motions were made after the court's entry of the dismissal orders and after the movants had,

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[18] The only explanation given is the *Chapparal* plaintiffs' lame assertion that it took a long time to divine the meaning and implications of the *Illinois Brick* decision.

in their legal memoranda in support of their opposition to the motion to dismiss, asserted that they stood, in regard to the co-conspiracy issue, on the allegations of their existing complaints. The plaintiffs tested the theory that their embellished allegations of passing-on were equivalent to allegations of packer complicity in the price-fixing conspiracy and lost. We have said before that

> [m]uch of the value of summary judgment procedure . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should the theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Freeman v. *Continental Gin Co.*, 5 Cir. 1967, 381 F.2d 459, 469-70.

The Supreme Court in *Foman* also declared that denial of leave to amend is proper when the proposed amendment would be futile. *Foman* v. *Davis*, *supra*, 371 U.S. at 182, 83 S.Ct. 227. The district court's denial of the post-judgment motions was supportable on this ground as well. Amendment of the complaints to allege a vertical conspiracy would not have brought these actions within the "control" exception in *Illinois Brick*. In footnote 16 of *Illinois Brick* the Court suggested the intended scope of the "control" exception by citing the Ninth Circuit's decision in *In re Western Liquid Asphalt Cases*, 1973, 487 F.2d 191, *cert. denied*, 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474. In that case there was evidence tending to show that the defendants controlled their direct customers "either through acquisition of stock, or indirectly through various financial arrangements, including credit". *Id.* at 195. It has been suggested that "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . . by strong-arming direct purchasers into choosing

not to sue". Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 328-29 (1978). The plaintiffs in these suits have never suggested that the grocery chains "controlled" the packers or slaughterhouses, either through stock ownership or credit arrangements. Indeed, the plaintiffs proposed to amend their complaints to allege a vertical conspiracy, not to allege arrangements by which the defendants controlled the packers and slaughterhouses.

Nor do we think that allegations of conspiracy would bring these cases within an exception for suits alleging vertical conspiracy. It is true that some courts have acknowledged such an exception. *E.g.*, *Florida Power Corp.* v. *Granlund*, M.D.Fla., 1978, 78 F.R.D. 441; *Donson Stores, Inc.* v. *American Bakeries Co.*, S.D.N.Y. 1973, 58 F.R.D. 481. Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains. *E.g.*, *Mosher Steel Corp.* v. *N.L.R.B.*, 5 Cir. 1978, 568 F.2d 436. Because the packers are not parties to this suit, the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the de-

fendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.

For these reasons we uphold the district court's refusal to permit post-judgment amendments to the complaints.

2. *The "Cost-Plus" Exception.*

The appellants urge that outright dismissal of their damage claims was error because the complaints stated good claims within the "cost-plus contract" exception in *Illinois Brick.*

The Supreme Court acknowledged in *Hanover Shoe* "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—when the considerations requiring that the passing-on defense not be permitted in this case would not be present". 392 U.S. at 494, 88 S.Ct. at 2232. The Court in *Hanover Shoe* seemed to suggest a general exception to the bar against assertion of a passing-on defense, an exception defined by the policies underlying the bar. Cases in which the middleman's customer is obligated under a pre-existing cost-plus contract to purchase a fixed quantity of goods are paradigmatic of this exception. The proof—the contract itself and evidence of its performance—is simple and unequivocal.[19] Uncertainties

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[19] In *Hanover Shoe* the Court emphasized the inadequacy of economic theory to the task of tracing the incidence of an overcharge. *See* note 7 *supra.* In *Illinois Brick* the Court elaborated on the point. The Court noted that economic theory provides a formula for determining the incidence of an overcharge, but that the analysis rests on "an array of simplifying assumptions" and assumes knowledge of the elasticities of supply and demand in the relevant market. 431 U.S. at 741-42, 97 S.Ct. 2061. The unacceptability of the

of proof are thus avoided. The risk of overlapping liability is eliminated or reduced to the barest minimum inasmuch as the evidence is not susceptible of differing interpretations and is unlikely to be accepted in one lawsuit and rejected in another.

As we understand these cases, the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that *Hanover Shoe* and *Illinois Brick* permit the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1454-57 (1978). "Although the Court intended the exception to have a 'narrow scope', any situation in which [the impact of] the overcharge is essentially determined in advance 'without reference to the interactions of supply and demand' would function in the same way." Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 331 n.93 (1978) [citations omitted]. When the impact of an overcharge on a middelman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts in separate lawsuits. Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate

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assumptions and the near-impossibility of measuring the relevant elasticities renders such incidence analysis little more than a guessing game in practice, the Court seemed to suggest. The Court was concerned not so much with the complexity of such proof as with its speculative character.

that the middleman suffered no loss in volume as the result of raising the price to his customers.[20] In the cost-

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[20] In *Yoder Bros., Inc.* v. *California-Florida Plant Corp.*, 5 Cir. 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540, a panel of this Court reversed a treble damages judgment that was erroneously reduced by recognition at trial of a passing-on defense. The Court ruled that the defense was not available because the evidence of the party asserting the defense did not demonstrate the applicability of the cost-plus exception suggested in *Hanover Shoe*. The Court found that the evidence did not show the effect of a price change on the direct purchaser's total sales or unit costs for a different sales volume. Under the rule of *Yoder Bros.*, the passing-on defense is unavailable absent evidence that the direct purchaser did not suffer harm in the form of lost sales volume, even if it is proved that the direct purchaser passed on the entirety of the overcharge.

Application of the *Illinois Brick* mutuality principle would suggest that, because under *Yoder Bros.* these defendants could not assert a passing-on defense at all in a treble damages suit brought by the packers and slaughterers absent proof that the packers and slaughterers suffered no loss of volume as a result of the alleged price-fixing, the cattlemen should be barred from using passing-on theory offensively against the defendants unless they demonstrate that the packers and slaughterers suffered no loss of volume. If this is so, then the bar against use of passing-on is absolute, for it would be impossible, not simply "virtually" impossible to make such a showing. Indeed, *Yoder Bros.* has the effect of eliminating the passing-on defense altogether, except perhaps in the very narrow case of a pre-existing, fixed quantity cost-plus contract.

We do not believe, however, that the *Yoder Bros.* Court's treatment of the pass-on issue is viable after *Illinois Brick*. The *Yoder Bros.* Court's very literal reading of *Hanover Shoe* to require parties asserting a pass-on defense to prove that the intermediary suffered no harm whatsoever rested, we think, on its view that the private treble damage action is

plus contract case itself, the middleman is likely to have suffered a loss of volume and hence profits as a result of the overcharge. His higher selling price will likely have caused potential customers to forego his product. *See* Note, 63 Cornell L.Rev. 309, 329 n.87. The middleman's loss of volume and the indirect purchaser's absorption of the overcharge are wholly separable items of damage.

Applying these principles, we conclude that the district court erred in dismissing these actions. The dis-

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of "overriding importance . . . in the antitrust enforcement scheme." *Id.* at 1375. Indeed, *Hanover Shoe* was plausibly read, before *Illinois Brick*, as resting on the view that the strong policy in favor of antitrust enforcement justifies buying enforcement at the expense of over-compensating plaintiffs. *See* note 6 *supra*. In *Illinois Brick*, however, the Court denigrated the importance of the antitrust enforcement rationale in the decision of *Hanover Shoe* and characterized the difficulty-of-proof problem as the key to *Hanover Shoe*. 431 U.S. at 732 n.12, 97 S.Ct. 2061 n.12. Indeed, *Illinois Brick* itself demonstrated that the policy in favor of vigorous antitrust enforcement must sometimes give way in face of the risk of overpunishing antitrust violators. The *Yoder Bros.* panel would not have taken so niggardly a view of the passing-on defense had it had the benefit of the *Illinois Brick* Court's interpretation of the *Hanover Shoe* opinion, or had it known the implications that its decision might have for antitrust plaintiffs after *Illinois Brick*.

Post-*Illinois Brick* commentary, moreover, has generally assumed that the issue of the impact on the direct purchaser's sales volume of an overcharge should not be dispositive in a case involving the offensive use of passing-on theory. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1455 n.69 (1977). *See also*, Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 329 n.87 (1978).

missal, we emphasize, was on the pleadings. The question at the pleading stage is simply whether the allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae [21] would enable measurement of the effect on prices for fat cattle of changes in whole prices.[22]

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[21] Because these cases come up on appeal from dismissals on the pleadings, we are not concerned with the question whether packers and slaughterers in fact applied pricing formulae without deviation, or with the question whether the formulae employed were such that a change in wholesale prices in a given region had a predetermined effect on the price offered feeders in the region by the packers and the slaughterers. We must assume, for purposes of these appeals, that the plaintiffs could demonstrate that both questions are to be answered in the affirmative.

[22] In *Hanover Shoe* the Court pointed out that in attempting to prove a pass-on a litigant would have to demonstrate that the intermediary would not have raised his price absent the overcharge. 392 U.S. at 493 and n.9, 88 S.Ct. 2224

The plaintiffs have alleged the functional equivalent of cost-plus contracts.

We do not agree with the appellees that the packer pricing mechanism alleged is exactly analogous to the "fixed percentage markup" or cost-based pricing systems rejected by the *Illinois Brick* Court as exceptions to the passing-on rule. In *Illinois Brick* the Court refused to recognize an exception where middleman "purport" to charge a fixed percentage markup. 431 U.S. at 743, 97 S.Ct. 2061. Here it is alleged that the packers *in fact* engaged in formula pricing. The Court in *Illinois Brick* was skeptical of the plaintiffs' claim because there is evidence that firms purporting to apply fixed markups above costs in fact fit the markup to the elasticity of demand for the product or juggle cost allocations to achieve the same result. F. Scherer, *Industrial Market Structure and Economic Performance* 176 (1970). An intermediary, such as a contractor in *Illinois Brick*, who employs numerous inputs in assembling his final product might bear the larger brunt of an increase in the price of one of his inputs without leaving any evidence that he did so. It is alleged that the intermediaries in these cases determine their purchase price for fat cattle by rigid application of formulae to the whole price for carcass beef. Assuming the allegations of the complaints

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and n.9. This is a causation issue. The Court's general rejection of the use of passing-on theory rested in part on its view that this issue of causation could not, except in rare cases, be resolved with adequate certainty. *See* note 17 *supra*. If, however, an intermediary over a long period of time consistently determines his purchase price by applying a fixed formula to the price he will receive when he in turn sells, the objection based on the speculativeness of the causation evidence disappears. Our legal system routinely permits triers of fact, as indeed it must, to infer causation, or the lack of causation, from the observation of deviation *vel nom* from long-indulged habit or practice.

to be true, a packer's absorption of a loss resulting directly from a decrease in the wholesale price would be detectable from a change in his purchasing formulae or from his paying a price for fat cattle that is above the price he would have paid had he adhered to his customary formulae. It is alleged, moreover, that the packers have no reason to depart from their purchasing formulae in the short run because short term supply is, by the very nature of cattle production, highly inelastic.

We recognize that it might be said that we are engaging in "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum". *See Illinois Brick*, 431 U.S. at 744-45, 97 S.Ct. at 2074. But the Supreme Court itself engaged in such a process in suggesting exceptions to its bar against the use of passing-on theories. If allegations of structural inelasticity of short term supply and of rigid formula pricing by intermediaries do not bring a case within the cost-plus exception for purposes of a motion to dismiss on the pleadings, then the cost-plus exception is a narrow one indeed, and must include only cases involving literal cost-plus contracts.[23] In light of the purposes behind the passing-on bar—preventing duplicative recoveries and avoiding the uncertainties involved in the use of incidence theory—the situation alleged in these complaints is the functional equivalent of the cost-plus contract case.

The appellees are correct in asserting that the proposed proof of damages is far from simple. It will require detailed proof as to individual transactions. Attention must focus on the type and grade of cattle sold, and on whether (and which) pricing formulae were used by packers in making particular purchases. The proof must

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[23] That view was recently taken by the Third Circuit Court of Appeals in *Mid-West Paper Products Co.* v. *Continental Groups, Inc.*, 596 F.2d 573 (1979), *as amended* April 5, 1979.

be detailed and particular. But this is a complexity born of quantity. The *kinds* of proof that will be involved, however, are not new to courts, and certainly not to antitrust courts. The cases as pleaded escape *Illinois Brick* only insofar as they avoid the use of general economic theory in tracing the effect of the defendants' price decisions, and only insofar as they can be proved, in the damages phase, with certainty. If, as to a particular transaction, it cannot be clearly shown that the purchasing packer applied a specific price formula, or if other details of a transaction, such as the quantity or grade of cattle, are not available, then the plaintiff cannot recover damages as to that sale.[24]

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[24] The appellees have suggested that the plaintiffs will have to trace their cattle through the chain of production to establish that the cattle they sold to packers and slaughterhouses were in turn sold, in carcass form, to members of the alleged retail chain conspiracy. If the prices allegedly established by the defendants were uniformly followed by the beef retailing industry, as the plaintiffs allege, however, tracing would be unnecessary. The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly, is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

We disagree with the recent ruling of a divided panel of the Third Circuit Court of Appeals that one who deals with a nonconspiring competitor of price-fixing firms lacks standing to sue those firms for treble damages. *See Mid-West Paper Products Co.* v. *Continental Group, Inc., supra* note 23,

We reverse the district court's dismissal orders. Because the pleadings state a case within the cost-plus exception. We emphasize that we are not ruling that these plaintiffs are entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of *Hanover Shoe* and *Illinois Brick*, the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages. Nor does our ruling imply that the plaintiffs may attempt to trace damages beyond the tier comprised of those who sell directly to the packers or slaughterers. Under the allegations of the complaint only those plaintiffs who sold directly to the packers or slaughterers that engaged in strict formula buying are entitled to maintain damage claims. The complaints do not allege that feeders or brokers "passed on" price depressions to ranchers or that they engaged in strict formula buying based solely on Yellow Sheet prices.

III.

The appellants also appeal the dismissal of their claims for injunctive relief on the basis of *Illinois Brick*. It follows from our ruling that it was error to dismiss the

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596 F.2d 587. That decision supports the appellees' contention, for if a person who deals directly with a nonconspiring competitor lacks standing, then an indirect purchaser from, or an indirect seller to, a nonconspiring competitor of the defendants *a fortiori* lacks standing. We agree with the dissent in *Mid-West Paper Products* that such a plaintiff satisfies the "target area" test for standing, *see* Part IV below, and that the injury suffered by such a plaintiff satisfies the tests for proximate causation. *See* 596 F.2d at 597.

damage claims on the pleadings that it was also error to dismiss the claims for injunctive relief on the pleadings. Our disposition of the injunctive relief issue, however, rests on the broader ground that the *Illinois Brick* rule has no application to claims for injunctive relief.

We agree with the reasoning of *Mid-West Paper Prods. Co.* v. *Continental Group, Inc.*, 3 Cir. 1979, 596 F.2d 573, *as amended* April 5, 1979. The court in that case ruled that *Illinois Brick* does not bar suits for injunctive relief by indirect purchasers in price-fixing actions because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief. An injunctive suit does not expose a defendant to monetary liability at all, much less to the risk of duplicative liability, and does not require the trier of fact to determine the incidence of the overcharge. To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs need show only "threatened loss or damage by a violation of the antitrust laws". 15 U.S.C. § 26. To show a threat of such injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their cattle, or that the conspiracy reduced the packers' demand for fat cattle.

The appellees argue that injunctive relief is barred to indirect sellers or purchasers whose damage claims are barred by *Illinois Brick* because *Illinois Brick* holds that such persons are not injured within the meaning of section 4 of the Clayton Act. Section 4 and section 16, they point out, are coextensive except that section 16, unlike section 4, does not require an injury to the plaintiff's "business or property". It therefore follows, it is urged, that indirect sellers or purchasers barred from section 4 treble damages by the *Illinois Brick* rule are not threatened with legally cognizable injury within the meaning of section 16.

We disagree with the appellees' characterization of the *Illinois Brick* decision. Formally, it is true, both *Hanover Shoe* and *Illinois Brick* held that, with the exceptions previously discussed, the overcharged direct purchaser, and not the indirect purchaser who may ultimately bear part of the overcharge, suffers the full injury for purposes of section 4. Had those decisions even purported to rest on a divination of the original meaning of section 4 of the Act we would agree with the appellees that *Illinois Brick* has clear implications for injunctive actions under section 16 as well. But neither *Hanover Shoe* nor *Illinois Brick* involved statutory construction in the ordinary sense. They are judicial glosses on an old statute, predicated on contemporary policy considerations. The implications of those decisions therefore reach only as far as the policy considerations informing them.

IV.

In its December 1977 order dismissing the actions, the district court granted the defendants' motion to strike allegations of retail price-fixing from the complaints. Those allegations charged the retail chains with conspiring to set artificially high prices for beef sold to retail consumers. The plaintiffs in all the suits appeal that action.

It was error to strike the allegations of retail price-fixing in the *Agee* and *Varian* complaints.[25] These complaints allege that some of the plaintiffs have purchased beef as consumers at prices affected by the alleged conspiracy. Such an allegation is an adequate allegation of the injury to one's "property" within the meaning of section 4 of the Clayton Act. *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

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[25] The *Agee* suit has been restyled *Shoshone Tribe of Duckwater, et al.* v. *Safeway Stores, Inc., et al.* We follow the parties' practice of referring to the case as "*Agee*".

That the allegations might have been added to the complaint in the effort to inject highly prejudicial matter into a lawsuit that is primarily based on wholesale price-fixing, as the appellees charge, is of no consequence, for Rule 18(a) of the Federal Rules of Civil Procedure grants the plaintiffs complete freedom to join in a single action all claims that they may have against any of the defendants. 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1582 (1971).

It was not error, however, to strike the retail price-fixing allegations from the remaining complaints. With the exception of the *Agee* and *Varian* complaints, none of the complaints alleged injury to the plaintiffs' business or property within the meaning of the Clayton Act. The appellants contend that they have adequately alleged injury to their businesses. They say that they intend to prove, under their allegations, that the alleged retail price-fixing conspiracy reduced consumer demand for beef, thereby derivatively reducing the retailers' and the packers' demand for the plaintiffs' fat cattle.

The appellants, however, lack standing to sue for such remote injury. Only those within the "target area" of an alleged antitrust conspiracy have standing to sue. *E.g.*, *Jeffrey* v. *Southwestern Bell*, 5 Cir. 1975, 518 F.2d 1129, 1131. The question of standing is a preliminary one, to be answered from examination of the allegations of the complaint. *Yoder Bros, Inc.*, v. *California-Florida Plant Corp.*, 5 Cir. 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540. Looking to the complaints, we find allegation of retail purchases in only the *Agee* and *Varian* complaints. In the other complaints we find, at best, allegations under which the plaintiffs could show harm flowing derivatively from a reduction in consumer demand. The "target" of a retail price-fixing conspiracy, however, is the retail purchaser. *E.g.*, *Kemp Pontiac-Cadillac, Inc.* v. *Hartford*

Automobile Dealers' Ass'n, 1974, D.Conn., 380 F.Supp. 1382, 1386. To recognize the non-purchasing plaintiffs as "targets" of the alleged retail price-fixing conspiracy would be to grant antitrust standing to firms and persons at every level in the chain of beef production and distribution. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 1972, 405 U.S. 251, 263 n.14, 92 S.Ct. 885, 891-892, 31 L.Ed.2d 184. Only the *Varian* and *Agee* allegations satisfy the "target area" test for standing to sue.

Shifting ground, the appellants argue that evidence of the alleged retail price-fixing conspiracy is highly relevant to their claims of monopolization and monopsony or oligopsony price-fixing at the wholesale level. The defendants' retail-level activities, they urge, are evidence of the defendants' monopoly power and proclivity to collude. Evidence of those activities is also essential, they contend, to painting for the jury a complete picture of the alleged conspiracy and of the industry in which it operates. They contend, in short, that they simply pleaded evidence.

This is not the place or time to debate the relevance of the retail price-fixing evidence. The district court had ample discretion, under Rule 12(f) of the Federal Rules of Civil Procedure, to order stricken from the complaint any redundant or immaterial matter. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1382 at 807 (1969). Although unnecessary evidentiary details are usually not striken from the complaint unless prejudicial or of no consequence to the controversy, *id.*; *see also Augustus* v. *Board of Public Instruction*, 5 Cir. 1962, 306 F.2d 862, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. *See* Rule 8(a) Fed.R.Civ.P.; 5 C. Wright

& A. Miller, *supra*, at 832-33. Many courts have properly stricken unnecessary evidentiary detail from pleadings. *E.g., Control Data Corp.* v. *International Business Machines Corp.*, 8 Cir. 1970, 421 F.2d 323; *Commissioner of Internal Revenue* v. *Licavoli*, 6 Cir. 1958, 252 F.2d 268; *Mitchell* v. *Hart*, 1966, S.D.N.Y. 41 F.R.D. 138, 143. The district court's action will not be disturbed unless it was an abuse of discretion. *E.g., Commissioner of Internal Revenue* v. *Licavoli*, *supra*, at 272. We find here no abuse of discretion. Nor do we perceive how the plaintiffs have been harmed. The district court's order striking the pleadings does not control the issues of materiality and relevancy that govern admissibility of the evidence. *E.g., Control Data Corp.* v. *International Business Machines Corp.*, *supra*, at 326-27. The plaintiffs need not plead these matters. *Schlick* v. *Penn-Dixie Cement Corp.*, 2 Cir. 1974, 507 F.2d 374, *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467. "If the trial court considers these matters proper proof upon the trial, he may admit them even though not pleaded." *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 1942, S.D.N.Y., 3 F.R.D. 157, 159.

V.

The plaintiffs in the *Pony Creek* action appeal the partial summary judgment entered against them on their claim that the defendants' fraudulent concealment of the alleged conspiracy tolled the four-year statute of limitation of section 4B of the Clayton Act. 15 U.S.C. § 15b.

The *Pony Creek* action was filed on June 5, 1975. Unless the statute of limitations was somehow tolled, the *Pony Creek* plaintiffs cannot recover for damages sustained prior to June 5, 1971. They allege in their complaint that they had failed to discover their cause of action before the June 1971 commencement of the limitations period because the defendants had fraudulently con-

cealed it from them. Fraudulent concealment tolls the Clayton Act's statute of limitations. *General Elecetric Co.* v. *City of San Antonio*, 5 Cir. 1964, 334 F.2d 480; *Rinzler* v. *Westinghouse Electric Corp.*, 5 Cir. 1964, 333 F.2d 719. To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim. *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 4 Cir. 1976, 546 F.2d 570; *Dayco Corp.* v. *Firestone Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389.

The defendant Kroger Co. ("Kroger") moved for partial summary judgment to the fraudulent concealment claim. Kroger submitted with its motion evidentiary matter that, it contended, conclusively established that the plaintiffs had known, or would have know through the exercise of due diligence, of the existence of their claims before June 5, 1971. The evidence consisted of copies of numerous articles and reports published in the late 1960's in newspapers and cattle industry trade journals, together with an affidavit attesting to the authenticity of the copies. The articles and reports publicized the dissatisfaction of livestock producers with cattle prices, as well as the charges of many cattlemen that the retail chains were colluding to depress prices. Many of the articles reported the filing, in 1968, of *Bray, et al.* v. *Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975) a lawsuit brought by several California cattlemen against major retail chains and which involved allegations essentially identical to those of the *Pony Creek* complaint. The defendants' exhibits showed that the allegations of the *Bray* complaint had received much publicity nationwide. The plaintiffs filed no counter-affidavits. They argued that the Bray lawsuit revealed no operative facts relating to their claim and that none were revealed until discovery in the *Bray* suit during 1973 disclosed that some of the de-

fendants had indeed discussed prices at trade association meetings.

Finding no genuine issue of material fact, and mindful of the suggestion in part 1.80 of the *Manual for Complex Litigation* that issues such as fraudulent concealment be determined as early as possible in complex litigation so as to define the scope of discovery,[26] the district court granted the motion.

The *Manual's* salutary principle notwithstanding, the question of when the statute of limitations began to run on the plaintiffs' cause of action is a factual one, *e.g.*, *Cicarone* v. *United States*, 3 Cir. 1973, 486 F.2d 253, 256, and is therefore not determinable on a motion for summary judgment. The district court's task was simply to determine whether a genuine question was presented justifying trial, F.R.Civ.P. 56(c), as the court fully recognized. The defendants, as the moving parties, had the burden of demonstrating the absence of any genuine

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[26] Part 1.80 states in relevant part:

> In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time and a summary judgment on some or all issues could be rendered in many cases.

Manual for Complex Litigation 80 (1977).

material issue of fact, and the plaintiffs had no obligation to present evidence opposing the motion unless the defendants' affidavit and exhibits initially established the absence of a genuine issue. *Advisory Committee Notes to the 1963 Amendments to Rule 56*, 31 F.R.D. 647, 648; *Adickes* v. *Kress*, 1970, 389 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142. Kroger's evidentiary showing went entirely to the issues of the plaintiffs' actual or constructive knowledge of their cause of action. The question presented, then, is whether Kroger's showing established the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, of their claim.[27]

From the affidavit and exhibits it is abundantly clear that the plaintiffs knew or should have known in 1968 and 1969 of the allegations of the *Bray* complaint. The *Bray* case was widely publicized in numerous issues of numerous trade publications, including, as the district court noted, an issue of The American National Cattlemen's Association's weekly publication *Beef Business Bulletin*, which, according to the supporting affidavit, had at the relevant time a circulation of nearly 300,000. The *Bray* complaint itself was, of course, a matter of public record. It is of no moment that Kroger presented no direct evidence demonstrating that the plaintiffs were actually aware of the *Bray* case. Even assuming that the inferences of actual knowledge to be drawn from Kroger's presentation were insufficient for summary judgment purposes, the evidence was more than adequate to es-

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[27] Kroger, of course, did not have to demonstrate the absence of triable fact issues as to the allegation that the defendants actively concealed the alleged conspiracy. If the defendants established that the plaintiffs knew or should have known of their cause of action before June 5, 1971, the running of the statute of limitations would not have been tolled even had the defendants affirmatively concealed the alleged scheme.

tablish beyond doubt that reasonably diligent cattlemen in the plaintiffs situation would have been aware, in the late 1960's, of the *Bray* allegations. Numerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public records. *E.g.*, *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389, 394; *Morgan* v. *Koch*, 7 Cir. 1969, 419 F.2d 993, 998; *Overfield* v. *Pennroad Corp.*, 8 Cir. 1944, 146 F.2d 889, 898; *Pettibone* v. *Cook County*, 8 Cir. 1941, 120 F.2d 850, 855. In a case involving a claim that the statute of limitations has been tolled, "the means of knowledge are the same thing as knowledge itself." *Wood* v. *Carpenter*, 1879, 101 U.S. (11 Otto) 135, 143, 25 L.Ed. 807.

The plaintiffs' knowledge of the *Bray* complaint, however, is not as a *matter of law* tantamount to actual or constructive knowledge of their claim. Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather* v. *Neva Paperbacks, Inc.*, 5 Cir. 1971, 446 F.2d 338, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it". Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[28]

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[28] That the *Bray* plaintiffs eventually succeeded (in 1975) in their lawsuit is of no consequence, for the *Bray* action might have disclosed nothing about the alleged conspiracy before June 5, 1971.

The leap from the plaintiff's knowledge of the *Bray* complaint to actual or constructive knowledge of their cause of action therefore involves factual issues. The defendants had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit. The summary judgment evidence consisted only of a demonstration that the plaintiffs should have been aware of the *Bray* complaint. There is no evidence in the record suggesting that the *Bray* litigation turned up any verification for the allegations before June 5, 1971, or that the plaintiffs had independent access before that time to any information, beyond the *Bray* complaint itself, that tended to verify their suspicions. At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before June 1971 had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the absence of genuine issues of fact the partial summary judgment must be reversed.

We should emphasize that this ruling is dictated by the posture of the question and the nature of the defendants' summary judgment showing. The plaintiff's bear the ultimate burden of persuasion on the fraudulent concealment issue. The burden is a heavy one. Those who have learned of facts "calculated to excite inquiry" must inquire. *Clement A. Evans & Co.* v. *McAlpine*, 5 Cir. 1970, 434 F.2d 100, 102, *cert. denied*, 402 U.S. 988, 91 S.Ct. 1660, 29 L.Ed.2d 153. The widely publicized *Bray* complaint certainly put these plaintiffs to a duty to investigate. They must demonstrate to the trier of fact that they investigated with reasonable diligence and discovered nothing that would have justified them in filing suit before June 5, 1971. *Id.; see also Dayco Corp.* v. *Goodyear*

Tire & Rubber Co., supra. In opposing the motion for summary judgment, however, the plaintiffs were not required to make any showing unless the defendants demonstrated that no genuine issues of fact underlay the due diligence question. This the defendants failed to do.

* * * *

The judgments below are REVERSED and the cases REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-1817 - 78-1829

(Consolidated)

Dist. Ct. Nos. CA-3-75-0702-C, CA-3-76-1237 & 1238-C, CA-3-76-1244C, CA-3-76-1248-C, CA-3-76-1253 & 1254-C, CA-3-76-1470-C, CA-3-77-0360 thru 0362-C

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET NO. 248

PONY CREEK CATTLE CO., INC., *et al.*,
Plaintiffs-Appellants

MUSSELMAN RANCH CO., ETC., *et al.*,
Plaintiffs-Intervenors-Appellants

v.

THE GREAT ATLANTIC & PACIFIC TEA CO., *et al.*,
Defendants-Appellees

R. DIRK AGEE, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

MEAT PRICE INVESTIGATORS ASSOCIATION, etc., *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

RICHARD S. LOWE, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

A. L. BLACK, *et al.*,
Plaintiffs-Appellants

v.

ALBERTSON'S, INC., *et al.*,
Defendants-Appellees (two cases)

CHAPARRAL CATTLE CORP., *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

BURKE PETERSEN, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

RONALD BECKER, *et al.*, on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

JOHN O. VARIAN, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., ETC., *et al.*,
Defendants-Appellees

LITTLE RANCH CO., INC., *et al.*,
Plaintiffs-Appellants

v.

THE NATIONAL ASSOCIATION OF FOOD CHAINS, ETC., *et al.*,
Defendants-Appellees

RONALD BECKER, *et al.*, on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants

v.

SAFEWAY STORES, ETC., *et al.*,
Defendants-Appellees

Appeals from the United States District Court for the Northern District of Texas

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Before WISDOM, HILL and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, REVERSED and the cases REMANDED for further proceedings consistent with this Court's opinion;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, BLACK, ET. AL., MEAT PRICE

INVESTIGATORS ASSOCIATION, ET. AL. and BECKER, ET. AL., VARIAN, ET. AL., CHAPARRAL CATTLE CORP., ET. AL. and PETERSEN, ET. AL., LITTLE RANCH CO., LOWE, ET. AL., and PONY CREEK, ET. AL., the costs on appeal to be taxed by the Clerk of this Court.

August 17, 1979

Issued as Mandate:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 78-1817-78-1829

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET NO. 248

PONY CREEK CATTLE CO., INC., *et al.*,
Plaintiffs-Appellants

MUSSELMAN RANCH CO., ETC., *et al.*,
Plaintiffs-Intervenors-Appellants

v.

THE GREAT ATLANTIC & PACIFIC TEA CO., *et al.*,
Defendants-Appellees

R. DIRK AGEE, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

MEAT PRICE INVESTIGATORS ASSOCIATION, etc., *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

RICHARD S. LOWE, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

A. L. BLACK, *et al.*,
Plaintiffs-Appellants

v.

ALBERTSON'S, INC., *et al.*,
Defendants-Appellees (two cases)

CHAPARRAL CATTLE CORP., *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

BURKE PETERSEN, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
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RONALD BECKER, *et al.*, on behalf of themselves and all other persons similarly situated,
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v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

JOHN O. VARIAN, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., *et al.*,
Defendants-Appellees

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,
Plaintiffs-Appellants

v.

SAFEWAY STORES, INC., ETC., *et al.*,
Defendants-Appellees

LITTLE RANCH CO., INC., *et al.*,
Plaintiffs-Appellants

v.

THE NATIONAL ASSOCIATION OF FOOD CHAINS, ETC., *et al.*,
Defendants-Appellees

RONALD BECKER, *et al.*, on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants

v.

SAFEWAY STORES, ETC., *et al.*,
Defendants-Appellees

Appeals from the United States District Court for the Northern District of Dallas

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ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 8-17-79, 5 Cir., 197—, —— F.2d ——)

(April 24, 1980)

Before WISDOM, HILL and FAY, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Pro-

cedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill

United States Circuit Judge

Form 704-2

79-1920
79-1959
No. 79-2060

Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

In re BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET No. 248

R. DIRK AGEE, *et al.*,
Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,
Respondent.

CHAPPARAL CATTLE CORP., *et al.*,
Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,
Respondent.

BURKE PETERSEN, *et al.*,
Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,
Respondent.

JOHN O. VARIAN, *et al.*,
Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX

In re BEEF INDUSTRY ANTITRUST LITIGATION,
M.D.L. DOCKET
No. 248.

PONY CREEK CATTLE CO., INC., et al.,
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RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
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vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

Nos. 78-1817—78-1829.
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
Aug. 17, 1979

Cattlemen, ranchers and feeders brought private actions against 25 retail food chains, a wholesale grocer, the retail chains' national trade association and a beef industry price reporting publication alleging violations of federal antitrust laws. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., dismissed the actions with prejudice for failure to state claims upon which relief can be granted. On appeal, the Court of Appeals, Wisdom, Circuit Judge, held that: (1) claims for damages were within

ambit of rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers; (2) complaints stated claims for damages within "cost-plus" exception to *Illinois Brick* bar; (3) *Illinois Brick* bar had no application to claims for injunctive relief; (4) complaints alleging retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy stated sufficient injury to one's "property" within meaning of Clayton Act; and (5) genuine issues of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding partial summary judgment on their claim that defendants' fraudulent concealment of alleged conspiracy tolled four-year statute of limitations of Clayton Act.

Reversed and remanded.

1. Monopolies — 28(1.6)

Rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers applied to suits brought by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication seeking relief for violations of Sherman Act. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

2. Monopolies — 28(1.6)

There is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes and application of rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. § 15, 26.

3. Monopolies — 28(1.7)

In actions by cattlemen, ranchers and feeders against retail food chain, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchases applied to complaints against trade publication and trade association even though they did not buy or sell beef at all and there were no firms in beef marketing system that dealt directly with them. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

4. Monopolies — 28(6.1)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, district court did not abuse its discretion in failing to give plaintiffs opportunity to amend their complaints, after *Illinois Brick* decision barring damages actions against alleged price fixers by indirect purchasers, to allege a vertical conspiracy, and by denying postjudgment requests for leave to amend. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

5. Federal Civil Procedure — 833

Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as result of rulings on a point of law handed down during pendency of litigation.

6. Monopolies — 28(6.2)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' retail trade asso-

ciation and beef industry price reporting publication involving alleged violations of federal antitrust laws, complaint stated cause of action within "cost-plus" exception to rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

7. Monopolies — 28(1.6)

One who deals with a nonconspiring competitor of price fixing firms has standing to sue those firms for treble damages. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

8. Monopolies — 24(7)

Rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers has no application to claims for injunctive relief. Clayton Act, § 16, 15 U.S.C.A. § 26.

9. Monopolies — 28(6.7)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, complaints of retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy sufficiently alleged an injury to one's "property" within meaning of Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

10. Monopolies — 28(1.6)

Only those within "target area" of alleged antitrust conspiracy have standing to sue. Clayton Act, § 4, 15 U.S.C.A. § 15.

11. Federal Civil Procedure — 103

Question of standing is a preliminary one, to be answered from examination of allegations of complaint.

12. Federal Civil Procedure — 650

Although unnecessary evidentiary details are usually not stricken from complaint unless prejudicial or of no consequence to controversy, evidence pleading, as distinguished from pleading of ultimate facts, is not favored under federal rules. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

13. Federal Courts — 817

District court's action in striking material from complaint will not be disturbed unless it was an abuse of discretion. Fed. Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

14. Federal Civil Procedure — 1124

In actions by cattlemen, ranchers and feeders against retail food chains wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, district court did not abuse its discretion in striking evidentiary details concerning alleged retail price-fixing conspiracy from complaint even if such allegations were relevant to claims of price fixing at wholesale level. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

15. Federal Civil Procedure — 2011

District court's order striking pleadings does not control issues of materiality and relevancy that govern admissibility of evidence. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

16. Limitation of Actions — 104(1)

Fraudulent concealment tolls Clayton Act's statute of limitations. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

17. Limitation of Actions — 104(1)

To avail himself of fraudulent concealment tolling doctrine of Clayton Act's statute of limitations, antitrust plaintiff must show that defendant concealed conduct complained of, and that he failed, despite exercise of due diligence on his part, to discover facts that form basis of his claim. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

18. Federal Civil Procedure — 2557

In action by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, genuine issue of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding partial summary judgment on their claim that defendants' fraudulent concealment of alleged conspiracy tolled four-year statute of limitations of Clayton Act. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

Ben L. Krage, Kasmir, Willingham & Krage, Dallas, Tex., for Pony Creek, et al.

Lowell V. Summerhays, Robinson, Guyon, Summerhays & Barnes, Salt Lake City, Utah, for Varian, et al., Chaparral Cattle Corp. et al. and Petersen, et al.

Robert R. Eidsmoe, Gleysteen, Harper, Kunze, Eidsmoe & Heidman, Sioux City, Iowa, Burt A. Braverman, Frances Chetwynd, Washington, D.C., for Lowe, et al.

Lex Hawkins, Glenn L. Norris, Hawkins & Norris, Des Moines, Iowa, John A. Cochrane, Cochrane & Bresnahan, St. Paul, Minn., for Meat Price Investigators Ass'n, et al. and Becker, et al.

James W. Witherspoon, Donald L. Davis, Witherspoon, Aikin & Langley, Hereford, Tex., for Black, et al.

Joseph M. Alioto, Steven J. Cannata, Law Offices of Joseph L. Alioto, San Francisco, Cal., for Little Ranch Co.

W. Randolph Elliott Baker, Glast, Riddle, Tuttle & Elliott, Dallas, Tex., for intervenors—Powell Cattle Co., et al.

Jess B. Hawley, Jr., Hawley, Troxell, Ennis & Hawley, Boise Idaho, for Albertson's Inc., Skaggs-Albertson's.

Sheldon S. Toll, Honigman, Miller, Schwartz & Cohn, Detroit, Mich. for Allied Supermarkets Inc.

Benjamin M. Quigg, Jr., Stephen W. Armstrong, James J. Rodgers, Morgan, Lewis & Bockius, Philadelphia, Pa., H. Dudley Chambers, Jackson, Walker, Winstead Cantwell & Miller, Dallas, Tex., for American Stores Co., f/k/a Acme Markets, Inc.

Roy Lewis Shults, Mitchell, Silberberg & Knupp, Los Angeles, Cal., for Arden-Mayfair, Inc.

Sylvan Rapaport, c/o Borman's, Inc., Detroit, Mich., for Borman's, Inc.

George B. Haley, Jr., Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Atlanta, Ga., Robert W. Coleman, Stalcup, Johnson, Meyers & Miller, Dallas, Tex., for Colonial Stores, Inc.

John D. Leech, Calfee, Halter & Griswold, Cleveland, Ohio, for First Nat. Stores, Inc.

David A. Rosen, Stein, Rosen & Ohrenstein, New York City, for Food Fair Stores, Inc.

H. Kenneth Kudon, Danzansky, Dickey, Tydings, Quint & Gordon, Washington, D.C., for Giant Food, Inc.

Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom, New York City, for The Grand Union Co.

Wilson W. Herndon, Strasburger & Price, Dallas, Tex., for Liaison Counsel.

Denis McInerney, Thomas F. Curnin, Cahill, Gordon & Reindel, New York City, for The Great Atlantic & Pac. Tea Co., Inc.

Theodore A. Groenke, Walter M. Jones, McDermott, Will & Emery, Chicago, Ill., for Jewel Companies, Inc.

Alexander E. Bennett, Norman Diamond, Washington, D.C., Wilson W. Herndon, Strasburger & Price, Dallas, Tex., for The Kroger Co.

Arnold M. Lerman, C. Loring Jetton, Jr., Wilmer, Cutler & Pickering, Washington, D.C., Jerry L. Buchmeyer, Thompson, Knight, Simmons & Bullion, Dallas, Tex., for Lucky Stores Inc.

James F. Rill, Martin A. Rosen, Collier, Shannon, Rill, Edwards & Scott, Washington, D.C., John L. Hauer, Richard C. Levin, Akin, Gump, Hauer & Feld, Dallas, Tex., for The Nat. Ass'n. of Food Chains.

Jeffrey S. Davidson Fred H. Bartlett, Jr., Daniel Edelman, Kirkland & Ellis, Chicago, Ill., for Nat. Provisioner, Inc.

Franklin P. Auwarter, Kenneth J. Jurek, Mayer, Brown & Platt, Chicago, Ill., for National Tea Co.

Peter D. Standish, Weil, Gotshal & Manges, New York City, for Pueblo Intern., Inc.

Les J. Weinstein, Aaron M. Peck, McKenna & Fitting, Los Angeles, Cal., for Ralph's Grocery Co.

Richard W. Odgers, John B. Bates, Pillsbury, Madison & Sutro, San Francisco, Cal., W. B. West, III, William F. Carroll, Clark, West, Keller, Sanders & Butler, Dallas, Tex., for Safeway Stores, Inc.

Michael R. Murphy, Donald B. Holbrook, Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for Skaggs Companies, Inc., Skaggs-Albertson's.

Robert D. Paul, Goodwin, Proctor & Hoar, Boston, Mass., Stanley E. Neely, Locke, Purnell, Boren, Laney & Neely, Dallas, Tex., for The Stop & Shop Companies, Inc.

Geoffrey M. Kalmus, Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, New York City, T. L. Caudle, III, Coke & Coke, Dallas, Tex., for Supermarkets General Corp.

Michael E. Bress, Dorsey, Windhorst, Hannaford, Whitney, Halladay, Minneapolis, Minn., for Super Valu Stores, Inc.

Timothy J. Sargent, Bodkin, McCarthy, Sargent & Smith, Los Angeles, Cal., for Thriftmart, Inc.

Ronald L. Olson, Munger, Tolles & Ricker-Hauser, Los Angeles, Cal., for Vons Grocery Co.

Chester Bedell, John A. DeVault, III, Charles P. Pillans, Bedell, Bedell, Dittmar & Zehmer, Jacksonville, Fla., Charles P. Storey, John K. DeLay Jr., Storey, Armstrong, Steger & Martin, Dallas, Tex., for Winn-Dixie Stores, Inc.

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, HILL, and FAY, Circuit Judges.

WISDOM, Circuit Judge:

These consolidated appeals involve the applicability of *Illinois Brick Co. v. Illinois*, 1977, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, to sales by primary producers to middlemen at prices allegedly depressed by price-fixing at the retail level of distribution. The appeals also present other difficult questions concerning federal antitrust laws.

These appeals arise from thirteen private antitrust actions alleging that the concerted activities of the defendants violate the provisions of §§ 1 and 2 of the Sherman Antitrust Act,

15 U.S.C. §§ 1 and 2. The complaints ask for treble damages and for injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U.S.C. 15 and 26. The plaintiffs are cattlemen, ranchers and feeders. The defendants are twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication.[1] The plaintiffs in the various suits charge that the retail chains combined, primarily by using the trade association and the price reporting publication, to fix at artificially low levels the prices at which beef is purchased from slaughterhouses and meat packers, and ultimately from the producers—cattle ranchers and feeders. The resulting depression in wholesale prices to retailers, passed up the chain of distribution, reduced the prices which the plaintiffs received in selling their cattle to the packers and slaughterhouses.

The Judicial panel on Multidistrict Litigation assigned the cases to the District Court for the Northern District of Texas, for coordinated or consolidated pretrial proceedings. *In re Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (Jud. Pan.Mult.Lit., 1976). In June 1977 the Supreme Court handed down its decision in *Illinois Brick*, holding that a purchaser could not maintain an antitrust damage action against a seller remote from him in the chain of distribution; rejecting, the

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[1] The lawsuits involved in this appeal are: *Petersen et al. v. Safeway Stores, Inc., et al.*; *Pony Creek Cattle Co., et al. v. The Great Atlantic & Pacific Tea Co., et al.*; *Lowe, et al v. Safeway Stores, Inc., et al.*; *Meat Price Investigators Ass'n et al. v. Safeway Stores, Inc., et al.*; *Shoshone Tribe of Duckwater, et al. (formerly styled Agee, et al.) v. Safeway Stores, Inc., et al*; *Black, et al. v. Acme Markets, Inc., et al.*; *Chapparal Cattle Corp., et al. v. Safeway Stores, Inc., et al.*; *Becker, et al. v. Safeway Stores, Inc., et al*; *Varian, et al. v. Safeway Stores, Inc., et al.*; and *Little Ranch Co., et al. v. The National Association of Food Chains, et al.*

narrow exceptions, the offensive use of "passing-on".[2] Shortly thereafter the defendants moved for dismissal of the complaints on the ground that the plaintiffs' theory of damages (sellers suing remote purchasers) was a "pass-on" theory indistinguishable in all important respects from the theory of damages (purchasers suing remote sellers) at issue in *Illinois Brick*. The district court agreed with the defendants and dismissed the complaints with prejudice for failure to state claims upon which relief could be granted. The court did not file an opinion, but stated from the bench that the dismissal was based on *Illinois Brick*.

The main issue is whether the complaints should have been dismissed on the strength of *Illinois Brick*. The plaintiffs/appellants also urge that the district court erred in striking from the complaints allegations of retail price-fixing. The plaintiffs in *Pony Creek Cattle Co., Inc., et al. v. The Great Atlantic & Pacific Tea Co., et al.* appeal partial summary judgments granted against them on their allegation that the statute of limitations was tolled because the defendants fraudulently concealed the alleged conspiracy. We agree with the defendants-appellees that the claims for damages, as pleaded, are within the ambit of the rule of *Illinois Brick*. Nevertheless we reverse and remand in all thirteen cases because the complaints state claims for damages within the "cost-plus" exception to the *Illinois Brick* bar. We reverse the partial summary judgments entered on the issue of fraudulent concealment in

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[2] "Passing-on" usually means the process whereby a middleman in the chain of distribution who has been overcharged by a manufacturer or by a producer adjusts his prices upward in sales to a lower level in the chain to reflect the overcharge. This case presents the converse of that situation. Here the passing-on was the result of alleged depressed prices fixed by retailers and imposed upon the middlemen (slaughterhouses and packers). In turn, the middlemen passed-on the undercharge, the depression in prices, to the primary producers (cattle ranchers and feeders).

Pony Creek. In the *Agee* and *Varian* cases, we reverse the district court's order striking the allegations of retail price-fixing. In addition, we hold that the complaints in all the cases state claims for injunctive relief under section 16 of the Clayton Act.

I

These actions were dismissed on the pleadings. The allegations of the complaints therefore are taken as true for purposes of these appeals.

The plaintiffs are all cattle ranchers or feeders or both. Cattle are bred and raised on farms, ranches, and commercial feedlots. The animals are fattened for slaughter by feeding them a concentrated ration for fast growth. Ranchers either fatten the cattle themselves or sell to or place the livestock with feeders for fattening. Most fat cattle, say the plaintiffs-appellants, are purchased by slaughterhouses and packers directly from the ranchers and feedlots, although some are purchased by the slaughterers through auction markets. The cattle are then slaughtered and most of the beef is sold as either boxed or carcass beef to retail and wholesale grocers. The large retail food chains buy most of their beef directly from slaughterers and packers. The complaints do not allege a conspiracy between the slaughterers and packers and the defendants.

The plaintiffs allege that the wholesale or carcass price of beef, the price paid by the retail chains to packers and slaughterers, is established by the large retail chains acting in concert. For any given week, it is alleged, the wholesale price in a given area of the United States is set by the pricing decision of the A & P or Safeway Stores, Inc. or the Kroger Co. or one of the other defendants. In antitrust jargon, each wields monopsony power in its region or, with others, oligopsony

power.[3] One designated retail chain in a given area will buy its beef in the regional wholesale market early in the week. The pricing decisions of the leading purchasers in the various regions of the nation are reported in the National Provisioner, Daily Market and News Service, ("National Provisioner") or "Yellow Sheet", and thus become known to the entire wholesale beef trade. The other retail chains, it is alleged, then follow the price established by the regional leader in purchasing their requirements of beef for the period. The chains, according to the complaints, can dictate the wholesale price to the packers because they wield monopsony or oligopsony power and because the packers have no long-term storage facilities and therefore cannot withhold their product.[4] The chains' power is augmented by their considerable cold-storage capacity: they can blunt price rallies by abstaining from the wholesale market and working from their stockpiles.

The price depressions thus engineered are directly "passed on" to the ranchers and feeders, according to the complaints. The plaintiffs allege that the cattlemen, like the slaughterers and packers *vis-a-vis* the chains, are in no position to negotiate prices because they cannot, at least in the short term, withhold their product. A fattened steer or heifer, the complaints allege, must be sold within three weeks of the time it reaches choice grade. If the animal is not sold in that time it becomes over-fattened and hence less valuable. The supply of fat cattle is therefore inelastic in the short term. The cattlemen contend

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[3] We use the term "monopoly" to refer to price-fixing by sellers; "monopsony" and "oligopsony" to refer respectively, to price-fixing by a single purchaser or by a group of purchasers, that is, the retailers/defendants in this case.

[4] Chainwide pricing decisions for a given region are made possible, according to the allegations of the complaints, by the chain's centralized buying practices. Purchases are made for an entire chain or for a large part of a chain, it is alleged, from a central location.

that they must take the price the packers quote. The packers according to the complaints, bid prices derived directly from the Yellow Sheet (or, west of the Rockies, the Safeway) carcass price. Working from estimates of the percentage of an animal that will be carcass beef salable to the retail chains, the packers pay cattle prices based on the Yellow Sheet prices.[5] Thus, the allegedly artificially low wholesale prices established by the retail chains' combination translate directly into artificially low prices for fat cattle.

The plaintiffs do not know when this alleged conspiracy began, but contend that it has been in operation since 1963 at the latest. The food chain defendants, according to the complaints, coordinate their efforts through meetings conducted by the National Association of Food Chains. The conspirators allegedly effect their price-fixing schemes by allocating to dominant chains geographical areas in which to exercise price leadership, and by controlling or manipulating the "Yellow Sheet". The elimination of price competition is further assured by alleged agreements concerning the conspirators' respective specifications for beef. The plaintiffs charge that the chains in any given region coordinate their specifications so that the chains do not compete with each other in purchasing beef of their respective specifications.

The complaints were filed in 1975. The cattlemen charge that the scheme violates section 1 of the Sherman Act, because it is a scheme "in restraint of trade and commerce". They also contend that the scheme was "an attempt to monopolize" and

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[5] As explained in Paragraph 28 of the Amended and Substituted Complaint in the *Meat Price Investigators Association* ("*MPIA*") suit:

> Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

had the effect of monopolizing the wholesale beef market in violation of section 2 of the Act. The complaints also allege that the retail chains fix the retail price of beef to consumers. They request injunctive relief, under section 16 of the Clayton Act, and treble damages going back to the beginning of the alleged conspiracy. The Clayton Act's four-year statute of limitations would ordinarily operate to limit recovery to damages accruing within four years of the filing of the complaints.[6] The plaintiffs, however, urged that the defendants and their co-conspirators fraudulently concealed the conspiracy from the beginning, and that the statute of limitations therefore did not begin to run until the plaintiffs discovered, in July 1974, that the alleged conspirators had indeed met to discuss the pricing of beef.[7]

In late 1975, before the instant actions were consolidated in the Northern District of Texas, that court entered partial summary judgments in the *Pony Creek* case, a suit originally filed in the Northern District of Texas, dismissing with prejudice the *Pony Creek* plaintiffs' claims for damages that accrued prior to June 5, 1971. In December of 1976, following the consolidation of the various actions in the Northern District of Texas, the defendants filed motions for partial summary judgment on the statute of limitations issue in the remaining suits. The district court denied those motions. The *Pony Creek* plaintiffs filed a motion to vacate the earlier par-

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[6] Section 4B of the Act, 15 U.S.C. § 15b, states, in relevant part:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

[7] That information was allegedly disclosed during discovery in *Bray, et al. v. Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975), a suit virtually identical to the instant actions brought by California cattlemen against many of the defendants in these cases.

tial summary judgments entered against them, but the district court has not acted on that motion.

In June 1977 the defendants in all the cases filed a joint motion for judgment on the pleadings based on the Supreme Court's opinion in *Illinois Brick*. They pointed out the absence of any allegations that the plaintiffs had sold cattle directly to the defendant retail chains. The suits, they contended, were therefore barred by the general rule of *Illinois Brick* that only those parties who have dealt directly with members of a price-fixing conspiracy can maintain an antitrust action for damages against the price-fixers. The plaintiffs asked the district court to stay its ruling on the defendants' motion pending further discovery. Six months later, in December, 1977, the district court entered its order dismissing twelve of the suits for failure to state claims and striking the allegations of retail price-fixing. The court dismissed the remaining case—the *Little Ranch* case—in February 1977. All the cases were dismissed with prejudice.

II

We address first the most important issue in these appeals: Did the district court err in dismissing the appellants' claims for damages?

A

We meet at the outset questions about the applicability of *Illinois Brick* to these actions. The appellants' first line of attack on the district court's decision is the bold argument that *Illinois Brick* simply has no application to these actions. They also urge that, assuming *Illinois Brick* is relevant, the decision cannot bar damage claims against the National Provisioner and the grocery chain trude association because neither is a buyer or seller of beef. In the interests of clarity, our assessment of these contentions will begin with a discussion of the background and rationale of the *Illinois Brick* decision.

The *Illinois Brick* rule barring damages actions against alleged price-fixers by indirect purchasers has its genesis in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 1968, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231. *Hanover Shoe* involved an antitrust treble-damages suit under § 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a lessee of the machinery. The plaintiff claimed damages arising from the defendant's practice of leasing, rather than selling, the machinery, a practice that the plaintiff contended was a violation of section 2 of the Sherman Act. The Supreme Court affirmed the trial court's refusal to permit the defendant to prove up the defense that any illegal overcharges imposed on the lessee shoe manufacturer had been passed on to that manufacturer's customers. The Court referred to a "general tendency in the law" not to trace damages "beyond the first step". 392 U.S. at 488 n.6, 88 S.Ct. 2224, n.6 (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 1918, 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451).[8] The Court rejected the defendant's argument that the general rule should admit of an exception when economic circumstances are such that the overcharge to the buyer both caused

[8] Before *Illinois Brick*, a strong case could have been made that the *Hanover Shoe* decision rested primarily on the Court's perception that the middleman, and not the remote purchaser, is the likeliest enforcer of the antitrust laws. Although it is probable that Hanover, like most middlemen, passed on much of the overcharge, recognition of a passing-on defense would have reduced the incentives for middlemen to sue. Professor Posner has observed: "The choice was thus between overcompensating Hanover and underdeterring United. The Court's preference for the former is consistent with the view that the primary purpose of antitrust damage actions is to deter violations of law." R. Posner, *Antitrust Cases, Economic Notes and Other Materials* 149 (1974). *See Illinois Brick*, 431 U.S. at 752-53, 97 S.Ct. 2061 (Brennan, J., dissenting).

In *Illinois Brick*, however, the Court observed that the *Hanover Shoe* decision rested primarily on the difficulty-of-proof problem, and not on the deterrence rationale. *Illinois Brick*, 431 U.S. at 732 n. 12, 97 S.Ct. 2061 n. 12.

and enabled the buyer to pass on the full overcharge to his customers. The impact of the overcharge on the buyer's pricing decisions, said the Court, cannot be demonstrated with any precision in the ordinary case. 392 U.S. at 492-93,[9] 88 S.Ct. 2224. Recognition of a general passing-on defense would, in the Court's opinion, simply encourage defendants to attempt to establish its applicability, thus complicating and protracting many antitrust proceedings. *Id.* at 493, 88 S.Ct. 2224. The Court rejected the passing-on defense as a general matter and expressed its view that the defense should be permitted only in certain narrow circumstances when the concerns underlying its rejection in *Hanover Shoe* were not present. *Id.* at 494, 88 S.Ct. 2224.

Hanover Shoe barred defensive passing-on, the use of passing-on as a defense in an antitrust action. In *Illinois Brick*, the Court resolved a split of authority in the courts of appeals by ruling that, with few exceptions, indirect purchasers of an alleged price-fixer's product cannot maintain a treble damages action predicated on the offensive use of the theory that the price-fixer's over charge to his customer was passed on to the plaintiffs. The plaintiffs were separated from the price-fixing

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[9] Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in the company's price will have on its total sales. Finally costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued 392 U.S. at 492-93, 88 S.Ct. at 2231.

offenders by two intervening transactions: the bricks moved from the manufacturers through subcontractors and general contractors to the consumers, carrying a four-cent-per-brick overcharge each time the brick changed hands. The court decided that if *Hanover Shoe* were to be followed, offensive as well as defensive use of passing-on must be barred. The Court noted that recognition of a "one-sided" limitation on a passing-on theory of damages would lead to a "serious risk of multiple liability". If offensive use of passing-on were permitted, a price-fixer could be held liable to an indirect purchaser for the amount of the overcharge passed-on to that purchaser by the price-fixer's direct customer yet, lacking a passing-on defense (under *Hanover Shoe*), would be liable to the direct purchaser, his customer, for the full amount of the overcharge.[10] Further, the Court concluded that the rationale of *Hanover Shoe* had not depended on the defensive context in which passing-on was asserted in that case. The "uncertainties and difficulties in analyzing price and out-put decisions" in the real world, 431 U.S. at 731-32, 97 S.Ct. at 2068, the "principal basis" for the *Hanover Shoe* holding, *id.* at 731, 97 S.Ct. 2061, counseled rejection of offensive passing-on as well. Those same "evidentiary complexities and uncertainties"

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[10] A serious risk of overlapping liability would remain even under a rule permitting the offensive use of passing-on only in situations in which the defendant could use a passing-on defense, unless the scope of passing-on were narrowly restricted to cases in which the incidence of overcharges could be established with certainty. That risk would arise from the risk of inconsistent factfindings in separate lawsuits by direct and indirect purchasers. Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornel L. Rev. 309, 319 n.43 (1978). The magnitude of that risk would vary directly with the speculativeness of the proof of the incidence of the overcharge. By narrowly limiting the use of passing-on to cases in which the overcharge can be traced with ease and certainty, see part II, B of this opinion below, the Supreme Court has all but eliminated this risk of duplicative liability.

and undesirable delays would attend the effort of indirect purchasers to establish that illegal overcharges were passed on to them. *Id.* at 732, 97 S.Ct. 2061. The Court decided, therefore, that the passing-on theory of damages must be barred in those situations in which the defendant could not assert a passing-on defense against his direct purchasers. *Id.* at 735-36, 97 S.Ct. 2061.

[1] Because *Illinois Brick* adopted a unified "mutuality" approach to passing-on problems we must reject the appellants' argument that *Illinois Brick* has no application to these suits insofar as they seek relief for violations of Section 2 of the Sherman Act. Under *Illinois Brick*, the plaintiffs would be entitled to urge a pass-on theory of damages only if the defendant retail chains could use a passing-on defense to claims brought by the packers and slaughterers. Whether the plaintiffs can proceed on a passing-on theory of damages is, applying the mutuality principal, a question unaffected by their denomination of the claim. Absent exceptional circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense.

The appellants' most ambitious contention is that *Illinois Brick* is entirely inapposite to price-fixing suits brought by sellers against indirect purchasers. They point out that *Illinois Brick* involved purchasers who charged price-fixing by a remote seller and contend that *Illinois Brick* should be limited to that type of case because the harm suffered by sellers in cases such as this one is much greater than the harm suffered by indirect purchasers in the paradigmatic *Illinois Brick*-type case. Especially is this so, they urge, when, as here, the alleged price-fixing conspiracy stands like a tollgate athwart the powerful "middle position" in the beef marketing system. The cattlemen's argument, we take it, is that the serious harm flow-

ing from monopsony or oligopsony price-fixing at a middle tier in an industry's structure outweighs the considerations, avoidance of overlapping liability and concern about complexities and uncertainties of proof, that underlay *Illinois Brick*—concerns that the Court may have overemphasized. *See* The Supreme Court, 1976 Term, 91 Harv. L.Rev. 70, 221-31 (1977).

The first step in assessing this argument is to examine the claim that the harm engendered by monopsony or oligopsony pricing of the kind alleged is, as a categorical matter, greater than that engendered by monopoly pricing. We focus first on monopsony or oligopsony pricing in general, without regard to the position occupied by the price-fixing combination in the productive chain. On this point, the appellants' contentions center on the harm suffered by the competitors themselves—the sellers. In the case of monopoly price-fixing, they say, the damaged buyer has a choice: he can refuse to buy the affected product and buy, instead, a substitute. In the monopsony or oligopsony price-fixing case, however, the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all. In their case, say the cattlemen, this means destroying fat cattle or, in the long run, cutting back production or going out of business.

We might acknowledge the difference as a general matter, but we have no reason to believe that the damage caused by the typical monopsony or oligopsony price-fixing scheme is significantly greater than that caused by the usual seller price-fixing scheme. Both types of price-fixing are attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses.[11] The appellants argue that

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[11] *See generally* J. Hibdon, *Price and Welfare Theory* 244-53 (Monopoly pricing); 264-67 (Monopsony) (1969); K. George & J. Shorey, *The Allocation of Resources* 150-52 (1978).

the reallocation process in the monopsony price-fixing case is inherently more likely than in the monopoly price-fixing case to cause business failures.[12] Assuming this to be true, *arguendo*, we do not think that this distinction is sufficient to warrant disparate treatment of monopoly and oligopsony for purposes of pass-on problems. If the *Illinois Brick* decision is grounded on a balancing of the deterrence and compensation policies of the treble-damages action against considerations of judicial economy and fairness to defendants—a view of *Illinois Brick* that is crucial to the appellants' argument[13]

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[12] In the case of monopoly price-fixing, the price-fixing generally raises the price of all goods that incorporate the product subject to the price-fixing. If the conspirators sell directly to the consuming public, the only businesses adversely affected are those in industries that supply complementary goods. If the conspirators do not sell directly to the consuming public, then the product is but an input in the production of other goods or services. By raising the cost of that input, the price-fixing conspiracy might conceivably have the effect of driving marginal firms that use the input out of the market. The likelihood of this occurring depends upon the magnitude of the cost of the input relative to the purchasing firm's total costs of production and on the elasticity of demand for the firm's product. A fifteen percent rise in the cost of beef, for example, threatens the profitability of a steakhouse far more than that of a grocery store. The impact will be greatest in the rare case of a firm that simply buys and resells only the good affected by the price-fixing conspiracy.

Most firms that sell directly to the typical monopsony or oligopsony price-fixing conspiracy, however, are in a position analogous to that of the single-product distributor who purchases his product from price-fixing conspirators. The good affected by the price-fixing conspiracy is likely to be the seller's only product or to represent a significant percentage of the seller's output. In general, the impact on a firm's revenues of a purchaser price-fixing scheme aimed at the product it sells is greater than the impact on a firm's costs of a monopoly price-fixing scheme affecting an input into the firm's product.

[13] If *Illinois Brick* did not involve such a balancing, even implicitly, then the appellants' argument that the greater harm flowing from purchaser, as compared with seller, price-fixing, justifies special treatment of passing-on problems in monopsony cases loses its premise. Formally, at least, *Illinois Brick* involved no such balancing as suggested in the text. The *Illinois Brick* holding is essentially the rule of mutuality. That rule was justified almost entirely by reference to the problem of overlapping liability, and the Court's focus on the risk of overlapping liability was a result

—it seems to us that the Supreme Court chose to permit entire price-fixing schemes, in some circumstances, to go unremedied by private damage actions. If the Court felt that competing considerations outweigh the costs of leaving unremedied the totality of harm flowing from some monopoly price-fixing schemes, we find it difficult to believe that the incremental harm, in the form of possible business failures, that might flow from unremedied monopsony or oligopsony price-fixing schemes would tip the Court's balance in favor of enforcement in the purchaser price-fixing case. The increment is too insignificant in comparison with the total damage caused by price-fixing.

The appellants urge that the Supreme Court has recognized that conspiracies aimed at sellers are especially abhorrent. None of the cases they cite, however, establish anything more than the unsurprising proposition that producers damaged by anti-competitive schemes have a remedy under the antitrust laws.[14] As support for their contention that conspiracies at the strategic middle position or "bottleneck" in an industry's structure are especially disfavored, they cite the Supreme Court's decisions in *American Tabacco Co. v. United States*,

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of its assumption that direct purchasers, as well as indirect, would likely sue the price-fixers. On the surface of it then, *Illinois Brick* does not acknowledge that its pass-on rule involves any significant sacrifice of antitrust enforcement: in those cases in which the rule bars indirect purchasers from suing, the direct purchasers, it is assumed, will likely come to the fore.

[14] *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1969, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; *Continental Ore v. Union Carbide & Carton Co.*, 1962, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777; *Klor's Inc. v. Broadway Hale Stores, Inc.*, 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741; *Mandeville Island Farms v. American Crystal Co.*, 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328. The cases cited by the appellants, with the exception of *Mandeville Island Farms*, were cases involving monopolization or exclusionary practices, not price-fixing. None involved passing-on theories of damage.

1946, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575, and *Standard Oil Co. of New Jersey v. United States*, 1191 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619. Those decisions, it is true, recognize the seriousness of monopsony or oligopsony at the dominant middle of an important industry's productive chain, but they do not single out that situation for special treatment under antitrust laws. We cannot carve from an important antitrust rule intended to be of general application exceptions based on the sheer magnitude or impact of the particular conspiracy alleged.

[2] We conclude that there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases.

A final issue as to the applicability of the *Illinois Brick* rule concerns the appellants' cases against the National Provisioner and the National Association of Food Chains. The appellants argue that the *Hanover Shoe-Illinois Brick* limitations on the use of passing-on theory apply only to suits brought against firms that are in the chain of production. They theorize that the "central rationale" of the *Hanover Shoe* and *Illinois Brick* decisions is that firms dealing directly with the alleged price-fixer are likelier than firms remote in the productive chain to sue and that severe limitations on the use of passing-on theory are necessary lest direct-dealing firms be discouraged from bringing suit. Because the trade publication and the trade association do not buy or sell beef at all, the argument continues, there are no firms in the beef marketing system that deal directly with these defendants. The cattlemen, the appellants conclude, are as likely as anyone to bring suit against those defendants.

[3] The argument rests on a faulty premise. The *Illinois Brick* decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory. The complaints in these cases do so. The National Provisioner and the National Association of Retail Chains do not buy or sell beef but the appellants' complaints charge that they conspired with firms that do buy beef to fix the purchase price of boxed and carcass beef. That the trade publication and trade association defendants do not market beef does not diminish the problems of overlapping liability and uncertainty of proof posed by the use of a passing-on theory of damages. The doctrine of *Illinois Brick* therefore applies to the complaints against these two defendants.

B

Having determined that the *Hanover Shoe-Illinois Brick* doctrine applies to the damages claims in their entirety we turn to the appellants' contentions that these actions fit recognized exceptions to the bar against use of passing-on theory.

1. The Co-Conspirator Exception.

Certain of the appellants contend that the complaints in these actions, liberally construed, allege a conspiracy between the retail chains, on the one hand, and the packers and slaughterers on the other.[15] They argue for an exception from the

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[15] Indeed, many of the allegations strongly suggest that all the non-defendant co-conspirators adverted to in the complaints are food retailers. Paragraph 34 of the MPIA Amended and Substituted Complaint, for example, states in part:

> b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts

Illinois Brick rule for cases involving a conspiracy between the remote price-fixers and the direct-dealing intermediary.

They argue, first, that cases involving conspiracy spanning two levels in the chain of distribution fit the exception recognized in *Illinois Brick* for cases in which the defendant owned or controlled its customer (the middleman). *Illinois Brick*, 431 U.S. at 736 n.16, 97 S.Ct. 2061 n.16.[16] If the retail chains conspired with the packers and slaughterers, they urge, the retailer can be said to have "controlled" the middleman within the meaning of footnote 16 of *Illinois Brick*. Market forces would have been superseded in such circumstances. There would then be no indirect dealing problem, it is argued, since those selling to the packers and slaughterers would have dealt directly with the price-fixing conspiracy.

Even if proof of a multilevel conspiracy would not bring the case within the "control" exception recognized in *Illinois*

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thereof have varied . . . thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas . . . .

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale . . . .

e. . . . Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the 'Safeway price,' and which prices are directly passed on to the beef producer.

[16] "Another situation in which market losses have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 [at] 197, 199." But "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants". The Supreme Court, 1976, 91 Harv.L.Rev. 70, 230 (1977).

Brick, it is urged, we should recognize a distinct exception for vertical conspiracies. The appellants argue that the defendants remote from the plaintiffs in the chain of distribution do not run the risk of double liability if it is proved that the intermediary was an equal participant in the price-fixing conspiracy, for the co-conspirator intermediary could not recover in a suit against the remote seller or purchaser. This is so, they say, because "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other". *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3, 15. *See also Premier Electrical Constr. Co. v. Miller-Davis Co.*, 7 Cir. 1970, 422 F.2d 1132, *cert. denied*, 1970, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58.

As the appellees point out, however, the co-conspiracy theory now urged by the plaintiffs-appellants was not set forth in the complaints. The theory of the complaints, both before and after the *Illinois Brick* decision, was that the defendants conspired to fix the prices paid to packers and that the packers simply "passed on" the price depression to cattlemen. Certain allegations in the complaints refer to unnamed co-conspirators, and the appellants now contend that the packers and slaughterers are included among those unnamed co-conspirators. Various paragraphs in the complaints refer to the unnamed co-conspirators as nondefendant food retailers. Nothing in the complaints, however, suggests that packers or other intermediaries conspired with the defendants. In their joint reply brief the appellants cite paragraph 34 of the *MPIA* and *Becker* Amended Complaints as an example of a

packer conspiracy allegation.[17] That paragraph, however, states merely that most slaughterers and packers have standing agreements with the defendant chain stores to supply fixed quantities of beef each week, and that the Yellow Sheet or "Safeway" price paid the packer sets the price that the packers pay the plaintiffs for their cattle. This is merely an allegation of passing-on, not of conspiracy. No agreement to fix prices is alleged. If the act of passing-on sufficed to brand the intermediary as a co-conspirator the asserted exception would wholly swallow the *Hanover Shoe-Illionis Brick,* rule.

[4] The appellants urge that the district court abused its discretion by failing to give them adequate opportunity to amend their complaints, after the *Illinois Brick* decision, to allege a vertical conspiracy, and by denying post-judgment requests for leave to amend. We do not agree.

[5] Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as the result of rulings on a point of law handed down during the pendency of the litigation. *E.g., Commissioner of Internal Revenue v. Estate of Donnell,* 5 Cir. 1969, 417 F.2d 106. In none of these cases, however did the district court before the entry of its dismissal order deny the plaintiffs leave to amend their complaints in light of *Illinois Brick.* And all plaintiffs had a reasonable opportunity to amend before the district court ruled on the defendants' dismissal motions. Those mo-

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[17] That paragraph states:

> Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway Price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

tions, based on *Illinois Brick*, were filed on July 17, 1977, eight days after the Supreme Court's decision. The district court did not rule on the motions until October, 1977. In three of the suits, the *MPIA*, *Becker*, and *Petersen* suits, the complaints were amended, with leave of court, after the filing of the defendants' motions to dismiss. None of those complaints, however, adequately alleged conspiracy. The plaintiffs in the remaining suits stood on the allegations of their complaints, asserting that the "unnamed" co-conspirators mentioned therein were indeed packers and slaughterers. Following the court's communication of its decision to the parties, an attorney for one of the plaintiffs requested that the dismissal be "without prejudice", but none of the plaintiffs attempted to amend the complaints until the *Black* and *Pony Creek* plaintiffs, *after* the court's December 9 entry of its order dismissing the suits with prejudice, filed motions for leave to amend.

The district court did not abuse its discretion in denying the post-judgment motions for leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure requires that leave to amend be freely granted "when justice so requires". The Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis*, 1962, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222. The plaintiffs have offered no credible explanation for their failure to move for leave to amend until nearly five months after the defendants moved for dismissal on the basis of *Illinois Brick*.[18] Absent any apparent justification for this delay, we cannot hold that the district court abused its discretion. We emphasize, moreover, that these motions were made after the court's entry of the dismissal orders

[18] The only explanation given is the *Chapparal* plaintiffs' lame assertion that it took a long time to divine the meaning and implications of the *Illinois Brick* decision.

and after the movants had, in their legal memoranda in support of their opposition to the motion to dismiss, asserted that they stood, in regard to the co-conspiracy issue, on the allegations of their existing complaints. The plaintiffs tested the theory that their embellished allegations of passing-on were equivalent to allegations of packer complicity in the price-fixing conspiracy and lost. We have said before that

> [m]uch of the value of summary judgment procedure . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should the theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Freeman v. Continental Gin Co., 5 Cir. 1967, 381 F.2d 459, 469-70.

The Supreme Court in *Foman* also declared that denial of leave to amend is proper when the proposed amendment would be futile. *Foman v. Davis, supra*, 371 U.S. at 182, 83 S.Ct. 227. The district court's denial of the post-judgment motions was supportable on this ground as well. Amendment of the complaints to allege a vertical conspiracy would not have brought these actions within the "control" exception in *Illinois Brick*. In footnote 16 of *Illinois Brick* the Court suggested the intended scope of the "control" exception by citing the Ninth Circuit's decision in *In re Western Liquid Asphalt Cases*, 1973, 487 F.2d 191, *cert. denied*, 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474. In that case there was evidence tending to show that the defendants controlled their direct customers "either through acquisition of stock, or indirectly through various financial arrangements, including credit". *Id.* at 195. It has been suggested that "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . .

by strongarming direct purchasers into choosing not to sue". Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 328-29 (1978). The plaintiffs in these suits have never suggested that the grocery chains "controlled" the packers or slaughterhouses, either through stock ownership or credit arrangements. Indeed, the plaintiffs proposed to amend their complaints to allege a vertical conspiracy, not to allege arrangements by which the defendants controlled the packers and slaughterhouses.

Nor did we think that allegations of conspiracy would bring these cases within an exception for suits alleging vertical conspiracy. It is true that some courts have acknowledged such an exception. *E.g., Florida Power Corp. v. Granlund*, M.D. Fla., 1978, 78 F.R.D. 441; *Donson Stores, Inc. v. American Bakeries Co.*, S.D.N.Y., 1973, 58 F.R.D. 481. Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains. *E.g., Mosher Steel Corp. v. N. L. R. B.*, 5 Cir. 1978, 568 F.2d 436. Because the packers are not parties to this suit, the possibility

of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.

For these reasons we uphold the district court's refusal to permit post-judgment amendments to the complaints.

2. The "Cost-Plus" Exception.

The appellants urge that outright dismissal of their damage claims was error because the complaints stated good claims within the "cost-plus contract" exception in *Illinois Brick.*

The Supreme Court acknowledged in *Hanover Shoe* "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—when the considerations requiring that the passing-on defense not be permitted in this case would not be present". 392 U.S. at 494, 88 S.Ct. at 2232. The Court in *Hanover Shoe* seemed to suggest a general exception to the bar against assertion of a passing-on defense, an exception defined by the policies underlying the bar. Cases in which the middleman's customer is obligated under a preexisting cost-plus contract to purchase a fixed quantity of goods are paradigmatic of this exception. The proof—the contract itself and evidence of its performance—is simple and unequivocal.[19] Uncertainties of proof are thus

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[19] In *Hanover Shoe* the Court emphasized the inadequacy of economic theory to the task of tracing the incidence of an overcharge. *See* note 7, *supra.* In *Illinois Brick* the Court elaborated on the point. The Court noted that economic theory provides a formula for determining the incidence of an overcharge, but that the analysis rests on "an array of simplifying assumptions" and assumes knowledge of elasticities of supply and demand in the relevant market. 431 U.S. at 741-42, 97 S.Ct. 2061. The unacceptability of the assumptions and the near-impossibility of measuring the relevant elasticities renders such incidence analysis little more than a guessing game in practice, the Court seemed to suggest. The Court was concerned not so much with the complexity of such proof as with its speculative character.

avoided. The risk of overlapping liability is eliminated or reduced to the barest minimum inasmuch as the evidence is not susceptible of differing interpretations and is unlikely to be accepted in one lawsuit and rejected in another.

As we understand these cases, the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that *Hanover Shoe* and *Illinois Brick* permit the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1454-57 (1978). "Although the Court intended the exception to have a 'narrow scope', any situation in which [the impact of] the overcharge is essentially determined in advance 'without reference to the interactions of supply and demand' would function in the same way." Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 331 n.93 (1978) [citations omitted]. When the impact of an overcharge on a middleman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts in separate lawsuits. Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate that the middleman suffered no loss in volume as the result of raising the price to his customers.[20] In the cost-plus

[20] In *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 5 Cir., 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540, a panel of this Court reversed a treble damages judgment that was erroneously reduced by recognition at trial of a passing-on defense. The Court ruled that the defense was not available because the evidence of the party asserting the defense did not demonstrate the applicability of the cost-plus exception suggested

contract case itself, the middleman is likely to have suffered a loss of volume and hence profits as a result of the over-

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in *Hanover Shoe*. The Court found that the evidence did not show the effect of a price change on the direct purchaser's total sales or unit costs for a different sales volume. Under the rule of *Yoder Bros.*, the passing-on defense is unavailable absent evidence that the direct purchaser did not suffer harm in the form of lost sales volume, even if it is proved that the direct purchaser passed on the entirety of the overcharge.

Application of the *Illinois Brick* mutuality principle would suggest that, because under *Yoder Bros.* these defendants could not assert a passing-on defense at all in a treble damages suit brought by the packers and slaughterers absent proof that the packers and slaughterers suffered no loss of volume as a result of the alleged price-fixing, the cattlemen should be barred from using passing-on theory offensively against the defendants unless they demonstrate that the packers and slaughterers suffered no loss of volume. If this is so, then the bar against use of passing-on is absolute, for it would be impossible, not simply "virtually" impossible, to make such a showing. Indeed, *Yoder Bros.* has the effect of eliminating the passing-on defense altogether, except perhaps in the very narrow case of a pre-existing, fixed quantity cost-plus contract.

We do not believe, however, that the *Yoder Bros.* Court's treatment of the pass-on issue is viable after *Illinois Brick*. The *Yoder Bros.* Court's very literal reading of *Hanover Shoe* to require parties asserting a pass-on defense to prove that the intermediary suffered no harm whatsoever rested, we think, on its view that the private treble damage action is of "overriding importance . . . in the antitrust enforcement scheme." *Id.* at 1375. Indeed, *Hanover Shoe* was plausibly read, before *Illinois Brick*, as resting on the view that the strong policy in favor of antitrust enforcement justifies buying enforcement at the expense of overcompensating plaintiffs. *See* note 6 *supra*. In *Illinois Brick*, however, the Court denigrated the importance of the antitrust enforcement rationale in the decision of *Hanover Shoe* and characterized the difficulty-of-proof problem as the key to *Hanover Shoe*. 431 U.S. at 732 n.12, 97 S.Ct. 2061 n.12. Indeed, *Illinois Brick* itself demonstrated that the policy in favor of vigorous antitrust enforcement must sometimes give way in face of the risk of overpunishing antitrust violators. The *Yoder Bros.* panel would not have taken so niggardly a view of the passing-on defense had it had the benefit of the *Illinois Brick* Court's interpretation of the *Hanover Shoe* opinion, or had it known the implications that its decision might have for antitrust plaintiffs after *Illinois Brick*.

Post-*Illinois Brick* commentary, moreover, has generally assumed that the issue of the impact on the direct purchaser's sales volume of an overcharge should not be dispositive in a case involving the offensive use of passing-on theory. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1455 n.69 (1977). *See also*, Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornel L.Rev. 309, 329 n.87 (1978).

charge. His higher selling price will likely have caused potential customers to forego his product. *See* Note, 63 Cornell L. Rev. 309, 329 n.87. The middleman's loss of volume and the indirect purchaser's absorption of the overcharge are wholly separable items of damage.

[6] Applying these principles, we conclude that the district court erred in dismissing these actions. The dismissal, we emphasize, was on the pleadings. The question at the pleading stage is simply whether the allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae[21] would enable measurement of the effect on prices for

[21] Because these cases come up on appeal from dismissals on the pleadings, we are not concerned with the question whether packers and slaughterers in fact applied pricing formulae without deviation, or with the question whether the formulae employed were such that a change in wholesale prices in a given region had a predetermined effect on the price offered feeders in the region by the packers and the slaughterers. We must assume, for purposes of these appeals, that the plaintiffs could demonstrate that both quesions are to be answered in the affirmative.

fat cattle of changes in wholesale prices.[22] The plaintiffs have alleged the functional equivalent of cost-plus contracts.

We do not agree with the appellees that the packer pricing mechanism alleged is exactly analogous to the "fixed percentage markup" or cost-based pricing systems rejected by the *Illinois Brick* Court as exceptions to the passing-on rule. In *Illinois Brick* the Court refused to recognize an exception where middlemen "purport" to charge a fixed percentage markup. 431 U.S. at 743, 97 S.Ct. 2061. Here it is alleged that the packers *in fact* engaged in formula pricing. The Court in *Illinois Brick* was skeptical of the plaintiffs' claims because there is evidence that firms purporting to apply fixed markups above costs in fact fit the markup to the elasticity of demand for the product or juggle cost allocations to achieve the same result. F. Scherer, *Industrial Market Structure and Economic Performance* 176 (1970). An intermediary, such as a contractor in *Illinois Brick*, who employs numerous inputs in assembling his final product might bear the larger brunt of an increase in the price of one of his inputs without leaving any evidence that he did so. It is alleged that the intermediaries in these cases determine their purchase price for fat cattle by rigid application of formulae to the wholesale price for carcass beef. Assuming the allegations of the com-

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[22] In *Hanover Shoe* the Court pointed out that in attempting to prove a pass-on a litigant would have to demonstrate that the intermediary would not have raised his price absent the overcharge. 392 U.S. at 493 and n.9, 88 S.Ct. 2224 and n.9. This is a causation issue. The Court's general rejection of the use of passing-on theory rested in part on its view that this issue of causation could not, except in rare cases, be resolved with adequate certainty. *See* note 17 *supra*. If, however, an intermediary over a long period of time consistently determines his purchase price by applying a fixed formula to the price he will receive when he in turn sells, the objection based on the speculativeness of the causation evidence disappears. Our legal system routinely permits triers of fact, as indeed it must, to infer causation, or the lack of causation, from the observation of deviation *vel non* from long-indulged habit or practice.

plaints to be true, a packer's absorption of a loss resulting directly from a decrease in the wholesale price would be detectable from a change in his purchasing formulae or from his paying a price for fat cattle that is above the price he would have paid had he adhered to his customary formulae. It is alleged, moreover, that the packers have no reason to depart from their purchasing formulae in the short run because short term supply is, by the very nature of cattle production, highly inelastic.

We recognize that it might be said that we are engaging in "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum". *See Illinois Brick*, 431 U.S. at 744-45, 97 S.Ct. at 2074. But the Supreme Court itself engaged in such a process in suggesting exceptions to its bar against the use of passing-on theories. If allegations of structural inelasticity of short term supply and of rigid formula pricing by intermediaries do not bring a case within the cost-plus exception for purposes of a motion to dismiss on the pleadings, then the cost-plus exception is a narrow one indeed, and must include only cases involving literal cost-plus contracts.[23] In light of the purposes behind the passing-on bar—preventing duplicative recoveries and avoiding the uncertainties involved in the use of incidence theory—the situation alleged in these complaints is the functional equivalent of the cost-plus contract case.

[7] The appellees are correct in asserting that the proposed proof of damages is far from simple. It will require detailed proof as to individual transactions. Attention must focus on the type and grade of cattle sold, and on whether (and which) pricing formulae were used by packers in mak-

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[23] That view was recently taken by the Third Circuit Court of Appeals in *Mid-West Paper Products Co. v. Continental Groups, Inc.*, 596 F.2d 573 (1979), *as amended* April 5, 1979.

ing particular purchases. The proof must be detailed and particular. But this is a complexity born of quantity. The *kinds* of proof that will be involved, however, are not new to courts, and certainly not to antitrust courts. The cases as pleaded escape *Illinois Brick* only insofar as they avoid the use of general economic theory in tracing the effect of the defendants' price decisions, and only insofar as they can be proved, in the damages phase, with certainty. If, as to a particular transaction, it cannot be clearly shown that the purcashing packer applied a specific price formula, or if other details of a transaction, such as the quantity or grade of cattle, are not available, then the plaintiff cannot recover damages as to that sale.[24]

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[24] The appellees have suggested that the plaintiffs will have to trace their cattle through the chain of production to establish that the cattle they sold to packers and slaughterhouses were in turn sold, in carcass form, to members of the alleged retail chain conspiracy. If the prices allegedly established by the defendants were uniformly followed by the beef retailing industry, as the plaintiffs allege, however, tracing would be unnecessary. The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly, is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

We disagree with the recent ruling of a divided panel of the Third Circuit Court of Appeals that one who deals with a nonconspiring competitor of price-fixing firms lacks standing to sue those firms for treble damages. *See Mid-West Paper Products Co. v. Continental Group, Inc., supra* note 23, 596 F.2d 587. That decision supports the appellees' contention, for if a person who deals directly with a nonconspiring competitor lacks standing, then an indirect purchaser from, or an indirect seller to, a nonconspiring competitor of the defendants *a fortiori* lacks standing. We agree with the dissent in *Mid-West Paper Products* that such a plaintiff satisifies the "target area" test for standing, *see* Part IV below, and that the injury suffered by such a plaintiff satisfies the tests for proximate causation. *See* 596 F.2d at 597.

We reverse the district court's dismissal orders. Because the pleadings state a case within the cost-plus exception. We emphasize that we are not ruling that these plaintiffs are entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of *Hanover Shoe* and *Illinois Brick*, the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages. Nor does our ruling imply that the plaintiffs may attempt to trace damages beyond the tier comprised of those who sell directly to the packers or slaughterers. Under the allegations of the complaint only those plaintiffs who sold directly to the packers or slaughterers that engaged in strict formula buying are entitled to maintain damage claims. The complaints do not allege that feeders or brokers "passed on" price depressions to ranchers or that they engaged in strict formula buying based solely on Yellow Sheet prices.

III.

The appellants also appeal the dismissal of their claims for injunctive relief on the basis of *Illinois Brick*. It follows from our ruling that it was error to dismiss the damage claims on the pleadings that it was also error to dismiss the claims for injunctive relief on the pleadings. Our disposition of the injunctive relief issue, however, rests on the broader ground that the *Illinois Brick* rule has no application to claims for injunctive relief.

[8] We agree with the reasoning of *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 3 Cir. 1979, 596 F.2d

573, *as amended* April 5, 1979. The court in that case ruled that *Illinois Brick* does not bar suits for injunctive relief by indirect purchasers in price-fixing actions because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief. An injunctive suit does not expose a defendant to monetary liability at all, much less to the risk of duplicative liability, and does not require the trier of fact to determine the incidence of the overcharge. To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs need show only "threatened loss or damage by a violation of the antitrust laws". 15 U.S.C. § 26. To show a threat of such injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their cattle, or that the conspirary reduced the packers' demand for fat cattle.

The appellees argue that injunctive relief is barred to indirect sellers or purchasers whose damage claims are barred by *Illinois Brick* because *Illinois Brick* holds that such persons are not injured within the meaning of section 4 of the Clayton Act. Section 4 and section 16, they point out, are coextensive except that section 16, unlike section 4, does not require an injury to the plaintiff's "business or property". It therefore follows, it is urged, that indirect sellers or purchasers barred from section 4 treble damages by the *Illinois Brick* rule are not threatened with legally cognizable injury within the meaning of section 16.

We disagree with the appellees' characterization of the *Illinois Brick* decision. Formally, it is true, both *Hanover Shoe* and *Illinois Brick* held that, with the exceptions previously discussed, the overcharged direct purchaser, and not the indi-

rect purchaser who may ultimately bear part of the overcharge, suffers the full injury for purposes of section 4. Had those decisions even purported to rest on a divination of the original meaning of section 4 of the Act we would agree with the appellees that *Illinois Brick* has clear implications for injunctive actions under section 16 as well. But neither *Hanover Shoe* nor *Illinois Brick* involved statutory construction in the ordinary sense. They are judicial glosses on an old statute, predicated on contemporary policy considerations. The implications of those decisions therefore reach only as far as the policy considerations informing them.

IV.

In its December 1977 order dismissing the actions, the district court granted the defendants' motion to strike allegations of retail price-fixing from the complaints. Those allegations charged the retail chains with conspiring to set artificially high prices for beef sold to retail consumers. The plaintiffs in all the suits appeal that action.

[9] It was error to strike the allegations of retail price-fixing in the *Agee* and *Varian* complaints.[25] These complaints allege that some of the plaintiffs have purchased beef as consumers at prices affected by the alleged conspiracy. Such an allegation is an adequate allegation of the injury to one's "property" within the meaning of section 4 of the Clayton Act. *Reiter v. Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). That the allegations might have been added to the complaint in the effort to inject highly prejudicial matter into a lawsuit that is primarily based on wholesale price-fixing, as the appellees charge, is of no consequence,

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[25] The *Agee* suit has been restyled *Shoshone Tribe of Duckwater, et al. v. Safeway Stores, Inc., et al.* We follow the parties' practice of referring to the case as "*Agee*".

for Rule 18(a) of the Federal Rules of Civil Procedure grants the plaintiffs complete freedom to join in a single action all claims that they may have against any of the defendants. 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1582 (1971).

It was not error, however, to strike the retail price-fixing allegations from the remaining complaints. With the exception of the *Agee* and *Varian* complaints, none of the complaints alleged injury to the plaintiffs' business or property within the meaning of the Clayton Act. The appellants contend that they have adequately alleged injury to their businesses. They say that they intend to prove, under their allegations, that the alleged retail price-fixing conspiracy reduced consumer demand for beef, thereby derivatively reducing the retailers' and the packers' demand for the plaintiffs' fat cattle.

[10, 11] The appellants, however, lack standing to sue for such remote injury. Only those within the "target area" of an alleged antitrust conspiracy have standing to sue. *E.g., Jeffrey v. Southwestern Bell*, 5 Cir. 1975, 518 F.2d 1129, 1131. The question of standing is a preliminary one, to be answered from examination of the allegations of the complaint. *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 5 Cir. 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed. 2d 540. Looking to the complaints, we find allegation of retail purchases in only the *Agee* and *Varian* complaints. In the other complaints we find, at best, allegations under which the plaintiffs could show harm flowing derivatively from a reduction in consumer demand. The "target" of a retail price-fixing conspiracy, however, is the retail purchaser. *E.g., Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n*, 1974, D.Conn., 380 F.Supp. 1382, 1386. To recognize the non-purchasing plaintiffs as "targets" of the alleged retail price-

fixing conspiracy would be to grant antitrust standing to firms and persons at every level in the chain of beef production and distribution. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 1972, 405 U.S. 251, 263 n.14, 92 S.Ct. 885, 891-892, 31 L.Ed.2d 184. Only the *Varian* and *Agee* allegations satisfy the "target area" test for standing to sue.

Shifting ground, the appellants argue that evidence of the alleged retail price-fixing conspiracy is highly relevant to their claims of monopolization and monopsony or oligopsony price-fixing at the wholesale level. The defendants' retail-level activities, they urge, are evidence of the defendants' monopoly power and proclivity to collude. Evidence of those activities is also essential, they contend, to painting for the jury a complete picture of the alleged conspiracy and of the industry in which it operates. They contend, in short, that they simply pleaded evidence.

[12-15] This is not the place or time to debate the relevance of the retail price-fixing evidence. The district court had ample discretion, under Rule 12(f) of the Federal Rules of Civil Procedure, to order stricken from the complaint any redundant or immaterial matter. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1382 at 807 (1969). Although unnecessary evidentiary details are usually not stricken from the complaint unless prejudicial or of no consequence to the controvery, *id.; see also Augustus v. Board of Public Instruction*, 5 Cir. 1962, 306 F.2d 862, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. *See* Rule 8(a) Fed.R. Civ.P.; 5 C. Wright and A. Miller, *supra*, at 832-33. Many courts have properly stricken unnecessary evidentiary detail from plead-

ings. *E.g., Control Data Corp. v. International Business Machines Corp.*, 8 Cir. 1970, 421 F.2d 323; *Commissioner of Internal Revenue v. Licavoli*, 6 Cir. 1958, 252 F.2d 268; *Mitchell v. Hart*, 1966, S.D.N.Y., 41 F.R.D. 138, 143. The district court's action will not be disturbed unless it was an abuse of discretion. *E.g., Commissioner of Internal Revenue v. Licavoli, supra*, at 272. We find here no abuse of discretion. Nor do we perceive how the plaintiffs have been harmed. The district court's order striking the pleadings does not control the issues of materiality and relevancy that govern admissibility of the evidence. *E. g., Control Data Corp. v. International Business Machines Corp., supra*, at 326-27. The plaintiffs need not plead these matters. *Schlick v. Penn-Dixie Cement Corp.*, 2 Cir. 1974, 507 F.2d 374, *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467. "If the trial court considers these matters proper proof upon the trial, he may admit them even through not pleaded." *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 1942, S.D.N.Y., 3 F.R.D. 157, 159.

V.

The plaintiffs in the *Pony Creek* action appeal the partial summary judgment entered against them on their claim that the defendants' fraudulent concealment of the alleged conspiracy tolled the four-year statute of limitations of section 4B of the Clayton Act. 15 U.S.C. § 15b.

[16, 17] The *Pony Creek* action was filed on June 5, 1975. Unless the statute of limitations was somehow tolled, the *Pony Creek* plaintiffs cannot recover for damages sustained prior to June 5, 1971. They allege in their complaint that they had failed to discover their cause of action before the June 1971 commencement of the limitations period because the defendants had fraudulently concealed it from them. Fraudulent con-

cealment to"s the Clayton Act's statute of limitations. *General Electric Co. v. City of San Antonio,* 5 Cir. 1964, 334 F.2d 480; *Rinzler v. Westinghouse Electric Corp.,* 5 Cir. 1964, 333 F.2d 719. To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.,* 4 Cir. 1976, 546 F.2d 570; *Dayco Corp. v. Firestone Tire & Rubber Co.,* 6 Cir. 1975, 523 F.2d 389.

The defendant Kroger Co. ("Kroger") moved for partial summary judgment on the fraudulent concealment claim. Kroger submitted with its motion evidentiary matter that, it contended, conclusively established that the plaintiffs had known, or would have known through the exercise of due diligence, of the existence of their claims before June 5, 1971. The evidence consisted of copies of numerous articles and reports published in the late 1960's in newspapers and cattle industry trade journals, together with an affidavit attesting to the authenticity of the copies. The articles and reports publicized the dissatisfaction of livestock producers with cattle prices, as well as the charges of many cattlemen that the retail chains were colluding to depress prices. Many of the articles reported the filing, in 1968, of *Bray, et al. v. Safeway Stores, et al.,* N.D.Cal., 392 F.Supp. 851 (1975) a lawsuit brought by several California cattlemen against major retail chains and which involved allegations essentially identical to those of the *Pony Creek* complaint. The defendants' exhibits showed that the allegations of the *Bray* complaint had received much publicity nationwide. The plaintiffs filed no counter-affidavits. They argued that the *Bray* lawsuit revealed no operative facts relating to their claim and that none were revealed until dis-

covery in the *Bray* suit during 1973 disclosed that some of the defendants had indeed discussed prices at trade association meetings.

Finding no genuine issue of material fact, and mindful of the suggestion in part 1.80 of the *Manual for Complex Litigation* that issues such as fraudulent concealment be determined as early as possible in complex litigation, so as to define the scope of discovery,[26] the district court granted the motion.

The *Manual's* salutary principle notwithstanding, the question of when the statute of limitations began to run on the plaintiffs' cause of action is a factual one, *e.g., Ciccarone v. United States*, 3 Cir. 1973, 486 F.2d 253, 256, and is therefore not determinable on a motion for summary judgment. The district court's task was simply to determine whether a genuine question was presented justifying trial, F.R.Civ.P. 56(c), as the court fully recognized. The defendants, as the moving parties, had the burden of demonstrating the absence of any genuine material issue of fact, and the plaintiffs had no obligation to present evidence opposing the motion unless the defendants' affidavit and exhibits initially established the absence of a genuine issue. *Advisory Committee Notes to the 1963 Amendments to Rule* 56, 31 F.R.D. 647, 648; *Adickes*

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[26] Part 1.80 states in relevant part:

> In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time and a summary judgment on some or all issues could be rendered in many cases.

Manual for Complex Litigation 80 (1977).

Kress, 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142. Kroger's evidentiary showing went entirely to the issues of the plaintiffs' actual or constructive knowledge of their cause of action. The question presented, then, is whether Kroger's showing established the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, of their claim.[27]

From the affidavit and exhibits it is abundantly clear that the plaintiffs knew or should have known in 1968 and 1969 of the allegations of the *Bray* complaint. The *Bray* case was widely publicized in numerous issues of numerous trade publications, including, as the district court noted, an issue of The American National Cattlemen's Association's weekly publication *Beef Business Bulletin*, which, according to the supporting affidavit, had at the relevant time a circulation of nearly 300,000. The *Bray* complaint itself was, of course, a matter of public record. It is of no moment that Kroger presented no direct evidence demonstrating that the plaintiffs were actually aware of the *Bray* case. Even assuming that the inferences of actual knowledge to be drawn from Kroger's presentation were insufficient for summary judgment purposes, the evidence was more than adequate to establish beyond doubt that reasonably diligent cattlemen in the plaintiffs' situation would have been aware, in the late 1960's, of the *Bray* allegations. Numerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public records. *E.g., Dayco Corp. v. Goodyear Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389, 394; *Morgan v. Koch*, 7 Cir. 1969, 419 F.2d 993, 998; *Overfield v. Pennroad Corp.*, 8 Cir. 1944, 146 F.2d

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[27] Kroger, of course, did not have to demonstrate the absence of triable fact issues as to the allegation that the defendants actively concealed the alleged conspiracy. If the defendants established that the plaintiffs knew or should have known of their cause of action before June 5, 1971, the running of the statute of limitations would not have been tolled even had the defendants affirmatively concealed the alleged scheme.

889, 898; *Pettibone v. Cook County*, 8 Cir. 1941, 120 F.2d 850, 855. In a case involving a claim that the statute of limitations has been tolled, "the means of knowledge are the same thing as knowledge itself." *Wood v. Carpenter*, 1879, 101 U.S. (11 Otto) 135, 143, 25 L.Ed. 807.

The plaintiffs' knowledge of the *Bray* complaint, however, is not *as a matter of law* tantamount to actual or constructive knowledge of their claim. Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather v. Neva Paperbacks, Inc.*, 5 Cir. 1971, 446 F.2d 338, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it." Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[28]

[18] The leap from the plaintiffs' knowledge of the *Bray* complaint to actual or constructive knowledge of their cause of action therefore involves factual issues. The defendants had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit. The summary judgment evidence consisted only of a demonstration that the plaintiffs should have been aware of the *Bray* complaint. There is no evidence in the record suggest-

[28] That the *Bray* plaintiffs eventually succeeded (in 1975) in their lawsuit is of no consequence, for the *Bray* action might have disclosed nothing about the alleged conspiracy before June 5, 1971.

ing that the *Bray* litigation turned up any verification for the allegations before June 5, 1971, or that the plaintiffs had independent access before that time to any information, beyond the *Bray* complaint itself, that tended to verify their suspicions. At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before June 1971 had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the absence of genuine issues of fact the partial summary judgment must be reversed.

We should emphasize that this ruling is dictated by the posture of the question and the nature of the defendants' summary judgment showing. The plaintiffs bear the ultimate burden of persuasion on the fraudulent concealment issue. The burden is a heavy one. Those who have learned of facts "calculated to excite inquiry" must inquire. *Clement A. Evans & Co. v. McAlpine*, 5 Cir. 1970, 434 F.2d 100, 102, *cert. denied*, 402 U.S. 988, 91 S.Ct. 1660, 29 L.Ed.2d 153. The widely publicized *Bray* complaint certainly put these plaintiffs to a duty to investigate. They must demonstrate to the trier of fact that they investigated with reasonable diligence and discovered nothing that would have justified them in filing suit before June 5, 1971. *Id.*; *see also Dayco Corp. v. Goodyear Tire & Rubber Co.*, *supra*. In opposing the motion for summary judgment, however, the plaintiffs were not required to make any showing unless the defendants demonstrated that no genuine issues of fact underlay the due diligence question. This the defendants failed to do.

* * *

The judgments below are REVERSED and the cases REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 78-1817—78-1829
(Consolidated)

Dist. Ct. Nos. CA-3-75-0702-C, CA-3-76-1237 & 1238-C, CA-3-76-1244-C, CA-3-76-1248-C, CA-3-76-1253 & 1254-C, CA-3-76-1470-C, CA-3-77-0360 thru 0362-C
In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET
No. 248.

PONY CREEK CATTLE CO., INC., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., etc., et al.,
Plaintiffs-Internevors-Appellants,
vs.
THE GREAT ATLANTIC & PACIFIC TEA CO. et al.,
Defendants-Appellees.

R. DIRK AGEE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS
ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RICHARD S. LOWE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
A. L. BLACK, et al.,
Plaintiffs-Appellants.
vs.
ALBERTSON'S, INC., et al.,
Defendants-Appellees (two cases).
CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
BURKE PETERSEN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
RONALD BECKER et al., on behalf of
themselves and all other persons
similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
JOHN O. VARIAN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS
ASSOCIATION et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.
LITTLE RANCH CO., INC., et al.,
Plaintiffs-Appellants,
vs.
THE NATIONAL ASSOCIATION OF
FOOD CHAINS, etc., et al.,
Defendants-Appellees.

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

Nos. 78-1817—78-1829.
Aug. 17, 1979

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before WIDSOM, HILL and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, REVERSED and the cases REMANDED for further proceedings consistent with this Court's opinion;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, BLACK, ET. AL., MEAT PRICE INVESTIGATORS ASSOCIATIONS. ET. AL., and BECKER, ET. AL., VARIAN, ET. AL., CHAPARRAL CATTLE CORP., ET. AL. and PETERSEN, ET. AL., LITTLE RANCH CO., LOWE, ET. AL., and PONY CREEK, ET. AL., the costs on appeal to be taxed by the Clerk of this Court.

August 17, 1979

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
OFFICE OF THE CLERK
FIFTH CIRCUIT
GILBERT F. GANUCHEAU
Clerk
April 24, 1980
Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

To All Parties Listed Below:

Nos. 78-1817—78-1829—In Re BEEF INDUSTRY ANTITRUST LITIGATION, MDL DOCKET NO. 248

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active

service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEA
Clerk
By SALLY HAYWARD
Deputy Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
Gilbert F. Ganucheau, Clerk
May 9, 1980
Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

Mr. John A. Cochrane
Attorney at Law
Suite 500, 360 Wabasha Street
St. Paul, Minnesota 55102

No. 78-1817 (Consolidated) MDL 248 Beef Industry Antitrust Litigation

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Mandate stayed to and including June 8, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from

the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate will issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, if any, judgment, or Rule 21 decision, and the denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
GILBERT F. GANUCHEAU
Clerk
LINDA ST. PIERRE
Deputy Clerk

/bh
enc.
cc: All Lead Counsel

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1817, et al.

Filed June 13, 1980
Gilbert F. Ganucheau, Clerk
MDL 248
BEEF INDUSTRY ANTITRUST LITIGATION
(Retail Cases).

Appeals from the United States District Court for the Northern District of Texas

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ORDER:

( ) The motions of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motions of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the

above mentioned certificate shall be filed with the Clerk of this Court within that time.

(x) The motions of LOWE, ET AL. and A.L. BLACK, ET AL. for a further stay of the issuance of the mandate is GRANTED to and including July 9, 1980, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motions of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ JAMES C. HILL
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:
BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee)
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA3-76-1254-C (Petersen)
CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

ORDER

The Court in its letter of October 19, 1977, informed the parties in the above causes that it would strike the retail price fixing allegations of the plaintiffs and dismiss plaintiffs' complaints on the basis of *Illinois Brick Co. v. Illinois*, —— U.S. ——, 97 S.Ct. 2061, 52 L.Ed 2d 707 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S., Oct. 3, 1977) (No. 76-404).

It is therefore ORDERED that the allegations listed in Appendix A to this Order are dismissed and stricken from such complaints.

It is further ORDERED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244-C, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

United States District Judge

Dec. 9, 1977

APPENDIX A

PLAINTIFFS' RETAIL PRICE-FIXING ALLOCATIONS

Petersen (CA 3-76-1254-C)

Amended Complaint, Section IV, Paragraph 2(b)-(d)

Pony Creek (CA 3-75-0702-C)

Third Amended Complaint, Paragraph 12(b)

MPIA (CA 3-76-1238-C)

Amended and Substituted Complaint, Paragraphs 34 (c)-(e) and 37(b)-(c)

Agee (CA 3-76-1237-C)

Amended Complaint, Section IV, Paragraphs 2(b)-(d)

Black (CA 3-76-1238-C)

Amended Complaint, Paragraphs 42b, 45b(2), 45b(4), 52, 72 and 74

Chaparral (CA 3-76-1253-C)

Complaint, Section V, Paragraphs 2(b) and 2(d)

Boccardo (CA 3-76-1255-C)

Amended Complaint, Paragraphs 57(b) and 57(d)

Becker (CA 3-76-1261-C)
Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)
Varian (CA 3-76-1470-C)
Complaint, Section III, Paragraphs 15 and 24; and Section V, Paragraphs 2(b), 2(d) and 3
Becker-DC (CA 3-77-0360-C)
Complaint, Paragraph 25(b)
MPIA-DC (CA 3-77-0361-C)
Complaint, Paragraph 23(b)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee)
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA 3-76-1254-C (Petersen)
CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

JUDGMENT

This action came on for hearing before the Court, Honorable W. M. Taylor, Jr., District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED, ADJUDGED and DECREED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244-C, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

ORDERED entered the 9th day of December, 1977, this 27th day of December, 1977.

W. M. TAYOR, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re Beef Industry
Antitrust Litigation

MDL Docket No. 284
This Matter Relates to:
No. CA 3-75-0702-C (Pony Creek)
No. CA 3-76-1238-C (MPIA)
No. CA 3-76-1248-C (Black)
No. CA 3-76-1255-C (Boccardo)
No. CA 3-76-1361-C (Becker)
No. CA 3-77-0360-C (Becker-DC)
No. CA 3-77-0361-C (MPIA-DC)
No. CA 3-77-0362-C (Little Ranch)

ORDER

Plaintiffs in the above-referenced actions have filed or joined in various motions in response to this Court's Order of December 9, 1977, which dismissed these and other cases with prejudice on the basis of *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S. Oct. 3, 1977). Each of these motions seeks reconsideration of this Court's Order and/or seeks leave to file post-dismissal amendments to the complaints in these actions. The Court having considered each of plaintiffs' motions, as well as defendants' joint response thereto, and the Court being of the opinion that dismissal of these cases with prejudice is appropriate under *Illinois Brick Co. v. Illinois, supra*, and that justice does not require leave to file amended pleadings in the present circumstances,

IT IS THEREFORE ORDERED that each of the motions listed in Appendix A to this Order should be, and hereby are, denied.

SIGNED AND ENTERED this 24th day of Jan., 1978.

United States District Judge

APPENDIX A

1. *A. L. Black, et al. v. Albertson's, Inc., et al.*, Docket No. CA 3-76-1248-C: Motion for Leave to File Second Amended and Substituted Complaint; Also, Joinder (by letter dated December 23, 1977) and Motions for Reconsideration identified in Items 3, 4 and 5 below.

2. *James F. Boccardo, et al. v. Safeway Stores, Inc., et al.*, Docket No. CA 3-76-1255-C: Motion for Leave to Amend the First Amended Complaint.

3. *Little Ranch Co., Inc., et al. v. The National Association of Food Chains, et al.*, Docket No. CA 3-77-0362-C: Motion for Reconsideration.

4. *Pony Creek Cattle Co., Inc., et al. and Musselman Ranch Co. and Powell Cattle Co. v. The Great Atlantic & Pacific Tea Co.*, Docket No. CA 3-76-0702-C: Motion for Reconsideration/ Motion for New Trial; Motion to Alter or Amend An Order and For Relief From Order; and Motion for Leave to File Amended Complaints

5. CA 3-76-1238-C (MPIA); CA 3-76-1361-C (Becker); CA 3-77-0360-C (Becker-DC); CA 3-77-0361-C- (MPIA-DC): Motion for Reconsideration, Pursuant to F.R.C.P. 59.

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Telephone: (702) 738-3179

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SHOSHONE TRIBE OF DUCKWATER, ANDY THOMPSON, WESLEY ALLISON, BOYD GRAHAM and the DUCKWATER STOCKMEN'S ASSOCIATION; RICHARD ADAMS; R. DIRK AGEE and MARTA SANFORD AGEE, his wife; JOHN W. ANDERSON; PAUL ANDRE; JOHN ANDREWS, SYLVAN ARONSON; ABRAM ARAFE; JOHN ATER; AVENALES CATTLE COMPANY; BAKER RANCHES, INC., a Nevada corporation; HAROLD U. BAKER, BALLARD RANCHES, INC., a Nevada corporation; LARRY BATEMAN and JOHN S. SUOMINEN, dba BATEMAN & SUOMINEN; GABRIEL BERCZI; ALAN BERRY and NORBERT NIZZI, dba BERRY & NIZZI; PETER PARIS, BERTRAND PARIS, SR., BERTRAND PARIS, JR., dba BERTRAND PARIS & SONS; JOSEPH L.	Civil No. R75-224-BRT AMENDED COMPLAINT (JURY TRIAL DEMANDED)

BLACK, JAMES P. O'
SULLIVAN and ROBERT
H. WEIGHT, dba BLACK
O'SULLIVAN & WEIGHT;
BRENDAN BOYLE;CONRAD
L. BREITENSTEIN and
LEOLA BREITENSTEIN,
his wife; FLOYD R.
BROWN; EUGENE
BUZZETTI and AMANDA
BUZETTI, his wife;
CLAUDE T. CARLINE;
JOHN C. CARPENTER
and ROSEANN C.
CARPENTER, his wife;
DALE B. CHRISTENSEN;
MURRAY ZWICK, ROBERT
H. WEIGHT, JOSEPH L.
SANDERS, RICHARD A.
NELSON and JOHN U.
SUOMINEN, dba CIRCLE
BAR CATTLE COMPANY;
CONNECTICUT CAPITAL
CORPORATION, a
California corpor-
ation; CORONA CAPITAL
CORPORATION, a New
York corporation;
EARL R. CRANE;
JOSEPH H. DAHER;
FRANKLIN J. DAILEY:
D. VERNON DALTON
and JOANNE B. DALTON,
his wife; WILLAMETTA
K. DAY; ROBERT E.
DICKENSON and
DOROTHY M. DICKENSON,
his wife; DUVAL
RANCHING COMPANY,

a Nevada corporation;)
CARL ECKHARDT, GRACE)
E. ECKHARDT, STANLEY)
Z. ECKHARDT and)
CAROL LYNN ECKHARDT,)
dbs ECKHARDT &)
SZAREK LIVESTOCK;)
CARL ECKHARDT;)
ELLISON RANCHING)
COMPANY, a Nevada)
corporation; JOE)
B. FALLINI, JR.)
and SUSAN L.)
FALLINI, his wife;)
JOE B. FALLINI,)
SR. and HELEN)
FALLINI, his wife;)
JAY KINGSLEY FIFE;)
LUIS J. FIGUEROA;)
LEO R. FOSTER;)
WILLIAM FRESCHI,)
JR.; WILLIAM)
FRESCHI, SR.;)
GEORGE GARDNER, dba)
GARDNER RANCHES;)
VAN C. GARDNER and)
MARGARET A. GARDNER,)
his wife; GLASER)
LAND & LIVESTOCK)
COMPANY, a Nevada)
corporation; GONDER'S)
RANCH, a co-partner-)
ship; GALAL GOUGH;)
DARIO GONZALES;)
MERLE GULDAGER and)
CARMEN GULDAGER,)
his wife; HALSTEAD-)
FORSGREN RANCHES,)
INC., a Nevada)

corporation; CARL J. HANKS; NORMAL G. HAWS, CAROLYN M. HAWS, GEORGE H. SHIVELEY and MARGARET A. SHIVELEY, DBA HAWS-SHIVELEY CATTLE COMPANY; DEE W. HECKENTHORN, formerly HECKENTHORN RANCHES, INC.; MANUEL HIDALGO; HOLSTEIN BEEF IMPROVEMENT CO-OP II, a California corporation; DONALD HUNTSMAN; JOE SUSTACHA, dba JOE SUSTACHA & SONS, a Nevada partnership; GRACIAN UHALDE and GRACIAN UDALDE, JR., dba JOHN UDALDE & COMPANY; HELENE KAKER; CHARLES KEENAN, JR.; SOO KIM; J. DEE LANSING; LAUCIRICA LIVESTOCK COMPANY, a Nevada corporation; R. CHARLES LeCLERC; LEE WILSON & COMPANY, a Delaware corporation; JACK LEWIS; WILLIAM LEWIS; NORMAN LINDLEY and SANDRA LINDLEY, dba LINDLEY RANCH

COMPANY; HENRY B.)
LOWSMA, individually)
and dba NORWOOD)
CATTLE FEEDING)
POOL and JANEDAN)
CATTLE FEEDING)
POOL; CAREY MADDEL;)
JOHN MANZONIE,)
GAYLIN MANZONIE,)
DELL MANZONIE, dba)
MANZONIE RANCH;)
BYRON MARSHALL;)
JOHN W. MARVEL and)
WILBURTA S. MARVEL,)
his wife; JOHN L.)
MATTICE and)
KATHLEEN MATICE,)
his wife; CHARLES)
MAURO; JAMES)
MEEKS; SEYMOUR)
MELNIK; RAYMOND Y.)
MENDIVE and TONI)
LINDA M. MENDIVE,)
his wife; JOHN)
MOORE; NELLO MORI)
and IDA MAE MORI,)
his wife; M.)
CONWAY MORRIS;)
MT. MORIAH RANCHES,)
INC., a Nevada)
corporation; PAUL)
J. NARCOWICH; H.)
L. NEWBOLD; JOSEPH)
ODDO; ADRIAN ORTEGA;)
JAMES E. O'SULLIVAN)
and ROBERT H. WEIGHT,)
dba O'SULLIVAN &)
WEIGHT; BERTRAND)
PARIS, JR., PIERRE)

V. PARIS and PAUL)
INCHAUSPE, dba)
PARIS, PARIS &)
INCHAUSPE, a Nevada)
partnership; GEORGE)
PARMAN and JEWELLE)
C. PARMAN, PETE)
PESCIO, JOHN PESCIO,)
TOM PESCIO and JOE)
PESCIO, dba PESCIO)
BROS. RANCHES, a)
partnership; PINE)
FOREST LAND & STOCK)
COMPANY; ROBERT E.)
PROBERT; JOHN A.)
RADCLIFFE; MICHAEL)
E. RAMOS; DOUG)
REED; KEITRICH)
REISCH; DONALD)
RIZZI and NORMA)
RIZZI, his wife;)
ROBERT R. WRIGHT)
COMPANY; a Nevada)
corporation;)
MARCEL ROMAN; LYNN)
ROSE and ELAINE)
ROSE, his wife;)
THEODORE RUTHERFORD;)
JOHN P. RYAN; SILAS)
JACK SINTON and)
RICHARD RUDNICK, dba)
S & R CATTLE COMPANY)
a Nevada partnership;)
SALICCHI RANCHES, INC.,)
a Nevada corporation;)
FLOYD SANDERS; ROBERT)
SCHUMAN; NELSON T.)
SCOTT; EARL F. SHARP)
and BARBARA A. SHARP,)

his wife; LeROY)
SHARP; MURRAY P.)
SHEVICK and LAWRENCE)
BRASLOW, dba SHEVICK)
& BRASLOW; SILAS JACK)
SINTON and LAURIE)
SINTON, dba SINTON)
FEED LOT; JAMES B.)
SINTON and NORMA M.)
SINTON, his wife;)
WILLIAM H. SMITH;)
SILAS D. SINTON and)
SILAS J. SINTON,)
dba SPRING RANCH, a)
partnership;)
DANDRIDGE SPROUL;)
STANLEY C. EILLISON)
CORPORATION, a cor-)
poration; JOE SUSTACHA;)
FERNANDO A. TELLEZ:)
PHILLIP TERMAN; DEVON)
TERRY; RALPH J.)
THOMPSON; TOM MARVEL)
RANCHES, INC., a)
Nevada corporation;)
EDWARD TOMERA and)
YOLE TOMERA, his)
wife; FRANK TYBUS;)
U X LIVESTOCK COMPANY,)
a Nevada corporation;)
HERBERT H. EHLIG,)
IONA UHLIG and ERNEST)
H. ULIG, dba EHLIG)
RANCHES; MIKE VASQUEZ)
and J. RONALD)
THOMPSON, dba VASQUEZ)
-THOMPSON CATTLE)
COMPANY; LUIS CARLOS)
VILLA; RUSSELL S.)

WEEKS; GEORGE WEISE;)
VERNON H. WESTWOOD)
and JOAN WESTWOOD,)
his wife; ARCHIE F.)
CORBARI, JR., dba)
WILD HORSE RANCH;)
CALVIN S. WINES and)
MARGARET M. WINES,)
his wife; CARROLL)
WINES and GWEN WINES,)
his wife; LEONARD N.)
WINES and RUTH WINES,)
his wife; JAMES)
WRIGHT and JOANN)
WRIGHT, his wife;)
DONALD E. ZERWEKH;)
ROBERT M. ZWEIG;)
FRANK ARREGUI and)
ELENA ARREGUI, his)
wife; WALTER E.)
BAUMANN and ERNEST)
O. BAUMANN, dba)
BAUMANN RANCHES, a)
Nevada partnership;)
WALTER F. BAUMANN)
and JAMES BAUMANN,)
dba BAUMANN RANCHES,)
a Nevada partnership;)
MABEL I. BIEROTH;)
RULON E. CHRISTENSEN;)
JOHN V. DAMELE and)
ROBERTA DAMELE, his)
wife; LEO J. DAMELE)
and ELLEN M. DAMELE,)
his wife; CHARLES B.)
EVANS, JR., PEGGY D.)
EVANS, JOHN W. KRENKA)
and WANDA L. KRENKA,)

dba CIRCLE BAR RANCHES, a Nevada partnership; THOMAS GALLAGHER, DOROTHY GALLAGHER, CHARLES DAMELE, R.D. DAMELE and G.W. GARRETT, dba DIAMOND LAND AND CATTLE, a Nevada partnership; THOMAS GALLAGHER, DOROTHY GALLACHER and G.W. GARRETT, dba DIAMOND LAND AND CATTLE, a Nevada partnership; LOUIS DRESSI and KEVIN DRESSI, dba DRESSI RANCHING COMPANY, a partnership; LeROY ETCHEGARAY and MARY JEAN ETCHEGARAY, his wife; CHARLES B. EVANS, JR. and PEGGY D. EVANS, his wife; MICHAEL H. GALLAGHER and CLARK WILDE, a partnership; THOMAS GALLAGHER and DOROTHY GALLAGHER, his wife; MELVIN R. JONES and RACHELE JONES, his wife; JULIAN TOMERA RANCHES, INC., a Nevada corporation; JOHN W. KRENKA and WANDA L. KRENKA, his wife; WILLIAM W. LEAR, LOUISE LEAR, KAY S. LEAR and WILLIAM

K. LEAR, dba LEAR)
RANCHES, a Nevada)
partnership; LEO)
DAMELE & SONS RANCHES,)
INC., a Nevada corpor-)
ation; THOMAS GALLAGHER,)
DOROTHY GALLAGHER, J.)
HARVEY SEWELL and)
MOLLY S. SEWELL, dba)
LIBERTY LIVESTOCK;)
HARRY LUND AND)
STITZEL, a Nevada)
partnership; LINDA)
S. WRIGHT, WILLIAM)
B. WRIGHT, JR., and)
JOHN P. WRIGHT, dba)
MARY'S RIVER RANCH,)
a co-partnership;)
JAMES L. McCORMICK,)
JR. and DANIEL M.)
McCORMICK, dba)
McCORMICK BROTHERS, a)
partnership; CLARA)
McDERMOTT; PETER L.)
MORI; JAMES B. MORSE)
and ESTELLA MORSE,)
his wife; FLORENCE)
G. PEAVEY, individually,)
and as Executrix of)
the Estate of W.R.)
PEAVEY and CAROL O.)
PEAVEY, dba PEAVEY)
CATTLE COMPANY; W.R.)
PEAVEY, FLORENCE G.)
PEAVEY, CARL O. PEAVEY)
and MARTHA F. PEAVEY,)
dba PEAVEY CATTLE)
COMPANY, a Nevada)
partnership; FLORENCE)

G. PEAVEY, individually,)
and as Executrix of)
the Estate of W.R.)
PEAVEY and MARTHA F.)
SIMS, dba PEAVEY &)
SIMS CATTLE COMPANY,)
a Nevada partnership;)
PETER L. DAMELE,)
LoRAINE DAMELE and)
BERNARD C. DAMELE,)
dba PETER DAMELE &)
SON, a Nevadd part-)
nership; JOE PIERETTI;)
JOE PIERETTI, as)
Trustee of the Trust)
of MARIA PIERETTI,)
deceased; FRANK)
PRUNTY and MARGE)
PRUNTY, his wife;)
RAND & SON, INC.;)
REED B. ROBISON; R.D.)
REYNOLDS and BARBARA)
REYNOLDS, his wife;)
THOMAS GALLAGHER and)
DOROTHY GALLAGHER,)
dba 765 CATTLE COMPANY;)
JAMES M. SMILEY and)
EDWARD H. SMILEY, dba)
SMILEY RANCH, a Nevada)
partnership; NORMAN)
L. THOMPSON and)
ELLEN THOMPSON, his)
wife; BATTISTA TOMERA,)
JR.; GEORGE TOMERA)
and BATTISTA TOMERA,)
JR., as Executors of)
the Estate of BALSAMINA)
TOMERA, dba TOMERA)
RANCHING, a Nevada)

partnership; JOHN TOMERA and ANNIE TOMERA, his wife; J.R. C. CORPORATION, a Utah corporation, dba TRANS-WORLD ENTERPRISES, dba LAVA RIDGE RANCHES, dba LAVA RIDGE TRUCKING; WILLIAM STOCK FARMING COMPANY, a Nevada corporation; FRANK WINCHELL and BESSIE WINCHELL, his wife; FRANK G. BAKER and TED BAKER, dba BAKER BROS., a Nevada partnership; BARNES RANCHES, INC., a Nevada corporation; DUILIO BOTTARI and ELLA MAY BOTTARI, his wife; ANDREW M. BOYD and JACK BOYD, dba BOYD RANCH, a Nevada partnership; GEORGE W. BROWN and RITA I. BROWN, his wife; BYINGTON STEEL TREATING, INC., dba BYINGTON RANCH, a corporation; JOHN K. CLAY; FREDA F. MUNSON and JOHN D. SECRIST, dba DINNER STATION RANCH, a partnership; A. GREER EDWARDS; JESS GOICOECHEA, ELIAS

GOICOECHEA, individually, and as Executors of the Estate of Fernando GOICOECHEA, dba FERNANDO GOICOECHEA & SONS, a Nevada partnership; GEORGE T. GLINDERS, ELIZABETH L. FLINDERS and THOMAS E. FLINDERS, dba FLINDERS RANCH, a Nevada partnership; WILLIAM H. GIBBS; FRANK W. HOOPER and PHYLLIS HOOPER, his wife; S.K. HOWARD, JANECE HOWARD, NEIL HOWARD and GERRI LYNN WITHERS, dba HOWARD RANCHES, a Nevada partnership; HOWARD RANCHES, INC., a Nevada corporation; RICHARD W. McKAY and ANNA McKAY, his wife; WILLIS PACKER, LOIS PACKER, DEAN RHOADS and SHARON RHOADS; REATA CATTLE COMPANY, a partnership; JOHN J. REED, individually and as Trustee of the Trust of VELMA REED, his wife, deceased; ROBERT G. OJEMANN and A. GREER EDWARDS, dba SAVAL RANCHING COMPANY, a Nevada partnership; TONY

SESTANOVICH and)
LORRAINE SESTANOVICH,)
his wife; VON L.)
SORENSEN and MARIAN)
SORENSEN, his wife;)
JESS SUSTACHA and)
MERILYN SUSTACHA,)
his wife; JACK C.)
TAYLOR; TAYLORS,)
LTD., a limited)
partnership; MARSHALL)
MORGAN, dba U3 RANCH;)
VAN NORMAN RANCHES,)
INC., a Nevada cor-)
poration; W&C CATTLE)
COMPANY, a Nevada)
corporation, W.H.)
GIBBS COMPANY, a)
Nevada corporation;)
FARNES G. EGBERT and)
DELORES EGBERT, his)
wife; VERNON HAWKES)
and FREDRICK)
BALLGARDT, dba HAWKES)
& BELLGARDT MARY'S)
RIVER RANCH; MARJORIE)
HOLBROOK, individually,)
and as Executrix of)
the Estate of BURT)
HOLSBROOK, deceased;)
CLAIR H. KNUDSEN and)
KATHLEEN KNUDSEN,)
his wife; ANDREW)
KNUDSEN and JANET)
KNUDSEN, dba KNUDSEN)
RANCH; NEFF RANCH)
COMPANY, a Nevada)
corporation; GEORGE)

NIXON and LaRUE NIXON, his wife; BLAINE SHARP and GERTRUDE SHARP, his wife; MAX SPRATLINE and JOYCE SPRATLING, his wife; STEPHEN G. WRIGHT and MAVIS WRIGHT, his wife; DAHL, INC., a Nevada corporation; PAUL SANSINENA and TERESA SANSINENA, his wife,

Plaintiffs,

vs.

SAFEWAY STORES, INC., a Maryland corporation; GREAT ATLANTIC & PACIFIC TEA CO., a Maryland corporation; THE KROGER CO., an Ohio corporation; AMERICAN STORES CO., formerly ACME MARKETS, a Delaware corporation; LUCKY STORES, INC., a California corporation; WINN DIXIE STORES, INC., a Florida corporation; FOOD FAIR STORES, INC., a Pennsylvania corporation; GRAND UNION CO., a Delaware cor-

poration; SUPERMARKETS)
GENERAL CORPORATION,)
a Delaware corporation;)
ALBERTSON'S, INC., a)
Nevada corporation;)
ARDEN-MAYFAIR, INC.,)
a Delaware corpora-)
tion; CIRCLE K. COR-)
PORATION, a Texas)
corporation; SKAGGS)
COMPANIES, INC., a)
Delaware corporation;)
THRIFTI MART, INC.,)
a California corpor-)
ation; NATIONAL)
ASSOCIATION OF FOOD)
CHAINS, an unincor-)
porated Association;)
THE NATIONAL PROVISIONER,)
a New York corporation;)
JEWEL COMPANIES, INC.,)
a New York corporation;)
NATIONAL TEA COMPANY,)
an Illinois corporation;)
STOP & SHOP, INC.,)
a Massachusetts corpor-)
ation; ALLIED SUPERMARKETS,)
INC., a Delaware corpor-)
ation; FIRST NATIONAL)
STORES, INC., a)
Massachusetts corporation;)
COLONIA STORES, INC., a)
Virginia corporation;)
PUEBLO INTERNATIONAL, INC.,)
A Delaware corporation,)

Defendants.

Plaintiffs, by their attorneys, bring this civil action against the above-named Defendants for treble the amount of damages suffered by them by reason of the Defendants' violations of the antitrust laws, of the United States, and demanding a trial by jury, complain and allege as follows:

I

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named Defendants for violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, (15 U.S.C. Sections 1 and 2) entitled "An Act to Protect Trade and Commence Against Unlawful Restraints and Monopolies", commonly known as

the Sherman Act. Plaintiffs also seek treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15 and 26).

2. Each of the Defendants or its agents maintains offices, transacts business, or is found within the State of Nevada and is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in furtherance of violations of the antitrust laws, as hereinafter alleged, have been performed within the State of Nevada. The interstate trade and commerce described hereinafter is carried on in part within the State of Nevada.

II

PARTIES

Plaintiffs:

1. The Plaintiff, SHOSHONE TRIBE OF DUCKWATER, is an American Indian tribe which holds its lands and cattle in common and has conducted a cow-calf operation in common with individual stewardship assignments for the care of said cattle apportioned among its tribe members. It conducts its cattle raising operations upon its tribal reservation located at Duckwater, Nevada. It has raised cattle in this manner for a period in excess of four years prior to the commencement of this Complaint.

2. The Plaintiffs ANDY THOMPSON, WESLEY ALLISON and BOYD GRAHAM are tribal leaders who are charged with

the responsibility of overseeing the cattle operation and who also hold cattle in their own right and have operated cow-calf operations at or near Duckwater, Nevada.

3. The Plaintiff DUCKWATER STOCKMEN'S ASSOCIATION is an unincorporated association conducting a cattle raising business in conjunction with that of the DUCKWATER SHOSHONE TRIBE under generally the same terms and circumstances and at the same location as said Indian tribe.

4. The following Plaintiffs: RICHARD ADAMS; JOHN W. ANDERSON; PAUL ANDRE; JOHN ANDREWS; SYLVAN ARONSON; ABRAM ARAJE; JOHN ATER; HAROLD U. BAKER; LARRY BATEMAN and JOHN S. SUOMINEN, dba BATEMAN-SUOMINEN; GABRIEL BERCZI; ALAN BERRY and NORBERT

NIZZI, dba BERRY-NIZZI; BRENDAN BOYLAN; JOSEPH L. BLACK, JAMES P. O'SULLIVAN and ROBERT H. WEIGHT, dba BLACK, O' SULLIVAN & WEIGHT; FLOYD R. BROWN; CLAUDE T. CARLINE; DALE B. CHRISTENSEN; MURRY ZWICK, ROBERT H. WEIGHT, JOSEPH L. SANDERS, RICHARD A. NELSON, and JOHN U. SUOMINEN, dba CIRCLE BAR CATTLE COMPANY; EARL R. CRANE; JOSEPH H. DAHER; FRANKLIN J. DAILEY; CARL ECKHARDT, GRACE E. ECKHARDT, STANLEY Z. EXKHARDT, and CAROL LYNN ECKHARDT, dba ECKHARDT & SZAREK LIVESTOCK; CARL ECKHARDT; JAY KINGSLEY FIFE; LUIS J. FIGUEROA; LEONARD R. FOSTER; WILLIAM FRESCHI, JR.; WILLIAM J. FRESCHI, SR.; GALAL GOUGH; DARIO GONZALES; NORMAN G. HAWS, CAROLYN M. HAWS, GEORGE H. SHIVERLEY and MARGARET A. SHIVERLEY, dba HAWS-SHIVELEY CATTLE COMPANY;

MANUEL HIDALGO; DONAL HUNTSMAN; HELEN KAKER; CHARLES KEENAN, JR.; SOO KIM; J. DEE LANSING; R. CHARLES LeCLERC; JACK LEWIS; WILLIAM LEWIS; BYRON MARSHALL; JAMES MEEKS; SYMOUR MELNIK; JOHN MOORE; M. CONWAY MOORIS; CAREY MADDELL; PAUL J. NARCOWICH; H.L. NEWBOLD; JOSEPH ODDO; ADRIAN ORTEGA; JAMES E. O'SULLIVAN and ROBERT H. WEIGHT, dba O'SULLIVAN & WEIGHT; JOHN A. RADCLIFFE; MICHAEL E. RAMOS; DOUG REED; DIETRICH REISCH; MARCEL ROMAN; THEODORE RUTHERFORD; JOHN P. RYAN; FLOYD SANDERS; ROBERT SCHUHMANN; NELSON T. SCOTT; MURRAY P. SHEVICK and LAWRENCE BRASLOW, dba SHEVICK & BRASLOW; MURRAY P. SHEVICK; WILLIAM H. SMITH; DANDRIDGE SPROUL; FERNANDO A. TELLEZ; PHILLIP TERMAN; DeVON TERRY; RALPH J. THOMPSON; FRANK TYBUS; MIKE

VASQUEZ and J. RONALD THOMPSON, dba VASQUEZ-THOMPSON CATTLE COMPANY; LUIS CARLOS VILLA; GEORGE WEISE; DONALD E. ZERWEKH; ROBERT E. PROBERT, and CHARLES MAURO contracted with one or more of the following Plaintiffs: CORONA CAPITAL CORPORATION, a New York corporation; CONNECTICUT CAPITAL CORPORATION, a California corporation; HOLSTEIN BEEF IMPROVEMENT CO-OP II, a California corporation, whereby the former engaged the latter in a cattle feeding program providing for the feeding and production of cattle for market at facilities located in Southern California.

5. The Plaintiffs R. DIRK AGEE and MARTA SANFORD AGEE, his wife, operate a cow-calf ranching operation in the O'Neil area of Elko County,

Nevada, and have done so for the past four years.

6. The Plaintiff AVENALES CATTLE COMPANY is a sole proprietorship owned by SILAS SINTON which conducts two separate cow-calf operations, one near Lamoille, Nevada and one near St. Luis Obispo, California.

7. The Plaintiff BAKER RANCHES, INC., is a Nevada ranching corporation which, for more than four years last passed, has conducted a family cow-calf ranching operation near Elko, Nevada.

8. The Plaintiff, BALLARD RANCHES, INC., is a family owned Nevada corporation, which conducts a feeder operation in Clover Valley, Elko County, Nevada, and has done so for the past four years or more.

9. The Plaintiff BERTRAND PARIS & SONS is a Nevada partnership consisting of PETER PARIS, BERTRAND PARIS, SR., and BERTRAND PARIS, JR. which operates a cow-calf ranching operation near Ely, Nevada, and has done so in excess of four years prior to the commencement of this action.

10. The Plaintiffs CONRAD L. BREITENSTEIN and LEOLA BREITENSTEIN, his wife, have conducted a cow-calf operation near Lameille, Nevada, and have done so in excess of four years prior to the commencement of this action.

11. The Plaintiffs EUGENE BUZZETTI and AMANDA BUZZETTI, his wife, operate a cow-calf ranching operation in the Lamoille area of Elko County, Nevada, and have done so for the past four

years or more.

12. The Plaintiffs JOHN C. CARPENTER and ROSEANN S. CARPENTER, his wife, are conducting, and have for at least the last four years conducted a family cow-calf ranching operation in the Elko, Eureka, Lander, Churchill and White Pine counties, Nevada, and Millard County, Utah.

13. The Plaintiffs D. VERNON DALTON and JOANNE B. DALTON, his wife, operate a cow-calf ranching operation in the Clover Valley area of Elko County, Nevada, and have done so for the past four years or more.

14. The Plaintiff WILLAMETTA K. DAY conducts a cow-calf ranching operation at Beowawe, Eureka County, Nevada, and has done so for the past four years or more.

15. The Plaintiffs ROBERT E. DICKENSON and DOROTHY DICKENSON, his wife, conduct a cow-calf ranching operation on a ranch known as the Moorman Ranch near Ely, Nevada, and have done so for a period in excess of four years prior to the commencement of this action.

16. The Plaintiff DUVAL RANCHING COMPANY is a family owned Nevada corporation which conducts a cow-calf ranching operation in Ruby Valley, Elko County, Nevada, and has done so for the past four years or more.

17. The Plaintiff, ELLISON RANCHING COMPANY is a family owned Nevada corporation which is conducting, and has for at least the last four years conducted, a cow-calf ranching operation in the counties of Elko,

Humboldt, Lander, Eureka and Churchill, State of Nevada.

18. The Plaintiffs JOE B. FALLINI, SR. and HELEN FALLINI, his wife, conduct a cow-calf operation near Ely, Nevada, and have done so for more than four years prior to the commencement of this action.

19. The Plaintiffs, JOE B. FALLINI, SR. and HELEN FALLINI, his wife, conduct a cow-calf operation at Twin Springs, Nevada, and have done so for more than four years prior to the commencement of this action.

20. The Plaintiff GEORGE GARDNER, dba GARDNER RANCHES conducts a ranching operation in Nevada consisting of a cow-calf and cow-steer ranch which has conducted business during all or a substantial portion of the four

years prior to the commencement of this action.

21. The Plaintiff VAN C. GARDNER and MARGARET A. GARDNER, his wife, conduct a cow-calf operation near Lund, Nevada, and have done so in excess of four years prior to the commencement of this action.

22. The Plaintiff GLASER LAND AND LIVESTOCK COMPANY is a family owned Nevada corporation which is conducting and has for at least the last four years conducted, a cow-calf ranching operation in the Halleck area of Elko County, Nevada.

23. The Plaintiff GONDER'S RANCH, is a partnership composed of the following partners: WAYNE D. GONDER, MOLLY GONDER, EMERSON W. GONDER, and OWEN L. GONDER, conducting business

as a cow-calf operation near Garrison, Utah which has so conducted business for at least four years prior to the commencement of this action.

24. The Plaintiff MERLE GULDAGER and CARMEN GULDAGER, his wife, conduct a cow-calf operation near Elko, Nevada, and have so conducted business for at least four years prior to the commencement of this action.

25. The Plaintiff HALSTEAD-FORSGREN RANCHES, INC., is a Nevada corporation which conducts a cow-calf operation near Duckwater, Nevada, and has done so for at least four years prior to the commencement of this action.

26. The Plaintiff CARL J. HANKS conducts a cow-calf operation on the Blue Eagle Ranch near Ely, Nevada,

and has done so for at least four years prior to the commencement of this action.

27. The Plaintiff DEE W. HECKETHORN is conducting the ranching operation which was formerly operated by HECKENTHORN RANCHES, INC., which has been so conducted for the last four years prior to the commencement of this action.

28. The Plaintiff JOE SUSTACHA & SONS is a Nevada partnership consisting of JOE SUSTACHA, JR., LUCILLE SUSTACHA, JAMES SUSTACHA and JOHN SUSTACHA which conducts a cow-calf operation near Lamoille, Nevada, and which has done so for more than four years prior to the commencement of this action.

29. The Plaintiff JOE SUSTACHA

conducts and/or has conducted a cow-calf operation near Lamoille, Nevada in his own right.

30. The Plaintiff JOHN UHALDE and GARCIAN UHALDE, JR., who conduct a cow-calf and beef ranching operation, together with one employee, near Ely, Nevada, and have done so for at least four years prior to the commencement of this action.

31. The Plaintiff LAUCIRICA LIVESTOCK COMPANY is a Nevada corporation which conducts a cow-calf operation near McGill, Nevada, and has done so for at least four years prior to the commencement of this action.

32. The Plaintiff LEE WILSON & COMPANY is a Delaware corporation, and conducts, among other enterprises, a cow-calf ranching operation in the

area of Lee, Elko County, Nevada, and has done so for the past four years or more.

33. The Plaintiffs NORMAL LINDLEY and SANDRA LINDLEY conduct a cow-calf operation sometimes referred to as LINDLEY RANCHING COMPANY on the Egan Range near McGill, Nevada, and have done so for at least four years prior to the commencement of this action.

34. The Plaintiff HENRY B. LOWSMA has conducted business as a member of a cattle feeding syndicate, sometimes known as the NORWOOD CATTLE FEEDING POOL and JANEDAN CATTLE FEEDING POOL located in Salt Lake County, State of Utah, and incurred substantial losses as a result of the wrongs of the Defendants as set forth in the allegations contained herein.

35. The Plaintiff MANZONIE RANCH is a Nevada partnership composed of the following partners: GAYLIN MANZONIE, DELL MANZONIE and JOHN MANZONIE. This ranching operation is located outside of Ely, Nevada, and consists of a cow-calf operation, a feed lot operation in which calves and cattle are brought to a medium stage of preparedness and the business also consists of a cattle purchase and sale organization.

36. The Plaintiffs JOHN W. MARVEL and WILBURTA S. MARVEL, his wife, are conducting, and have for at least the last four years conducted, a family cow-calf ranching operation in Lander and Humboldt counties, Nevada.

37. The Plaintiffs JOHN L. MATTICE and KATHLEEN MATTICE conduct a cow-calf

operation near Elko, Nevada. These Plaintiffs are the parents of the Plaintiff LEOLA BREITENSTEIN and these Plaintiffs' operation has been most recently sold to the BREITENSTEINS.

38. The Plaintiffs RAYMOND Y. MENDIVE and TONI LINDA MENDIVE, his wife, are conducting, and have for at least the last four years conducted a family cow-calf ranching operation in the Jiggs area, Elko County, Nevada.

40. The Plaintiffs NELO MORI and IDA MAE MORI, his wife, are conducting and have for at least the last four years conducted, a family cow-calf ranching operation in the Tuscarora area, Elko County, Nevada.

41. The Plaintiff MT. MORIAH RANCHES, INC., is a Nevada corporation which conducts a cow-calf operation

near Bakerstage outside of Ely, Nevada, and has done so for the last four years prior to the commencement of this action.

42. The Plaintiff PARIS, PARIS & INCHAUSPE, is a partnership owned and operated by BERTRAND PARIS, JR., PIEERE V. PARIS and PAUL INCHAUSPE, which is conducting and has for at least the last four years conducted a cow-calf ranching operation in Eureka and Lander Counties, Neveda.

43. The Plaintiffs GEORGE PARMAN and JEWELLE C. PARMAN conduct a cow-calf ranching operation in Eureka, Nevada and have for at least four years prior to the commencement of this action.

44. The Plaintiffs PETE PESCIO, JOHN PESCIO, TOM PESCIO and JOE PESCIO,

dba PESCIO BROS. RANCHES, a Nevada partnership, have conducted a cow-calf operation in McGill, Nevada, and have for at least four years prior to the commencement of this action.

45. The Plaintiff PINE FOREST LAND & STOCK COMPANY, a Nevada corporation in Winnemucca, Nevada, and has done so for at least four years prior to the commencement of this action.

46. The Plaintiffs DONAL RIZZI and NORMAN RIZZI, his wife, are conducting and have for at least the last four years conducted, a family cow-calf ranching operation in the Mountain City area, Elko County, Nevada.

47. The Plaintiff ROBERT R. WRIGHT COMPANY is a family owned Nevada corporation which is conducting, and has for at least the last four years con-

ducted, a cow-calf ranching operation in the Clover Valley area of Elko County, Nevada.

48. The Plaintiff LYNN ROSE is a livestock broker and dealer who operates that business, together with his wife, ELAINE ROSE. He and his wife also, from time to time during the last four years, operated a cow-calf ranching operation and feeder operation. The ROSES have engaged in speculative buying and selling of cattle during the relevant period.

49. The Plaintiff S&R CATTLE COMPANY, a partnership owned and operated by SILAS JACK SINION and RICHARD RUDNICK, which is conducting, and has for at least the last four years conducted a feeder operation in the State of California.

50. The Plaintiff SALICCHI RANCHES, INC. is a family owned Nevada corporation which is conducting and has for at least the last four years conducted a cow-calf ranching operation, in Lamoille area, Elko County, Nevada.

51. The Plaintiffs EARL F. SHARP and BARBARA A. SHARP, his wife, have conducted a cow-calf operation in Ely, Nevada since 1972; and prior to 1973, said operation was conducted by LeROY SHARP, Plaintiff EARL F. SHARP'S father during the relevant period.

52. The Plaintiffs SILAS JACK SINTON and LAURIE SINTON, dba SINTON FEEDLOT, operate an extensive cattle feeding operation in Central California and have done so for all or a substantial portion of the four years imme-

diately prior to the commencement of this action.

53. The Plaintiffs JAMES B. SINTON and NORMA M. SINTON, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation in the State of California.

54. The Plaintiffs SILAS D. DINTON and PLYLLIS J. SINTON, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation in the States of Nevada and California.

55. The Plaintiff SPRING RANCH COMPANY is a family partnership owned and operated by SILAS D. SINTON and PHYLLIS D. SINTON, which is conducted and has for at least the last four years conducted a feeder operation in

the State of California.

56. The Plaintiff STANLEY C. ELLISON CORPORATION, a Nevada corporation, which is conducting and has for at least the last four years conducted a cow-calf ranching operation, is in the Tuscarora area, Elko County, Nevada.

57. The Plaintiff STEPTOE RANCH COMPANY operates a cow-calf operation in Northern Nevada and has done so for a substantial portion of the last four years prior to the commencement of this suit.

58. The Plaintiffs GEORGE NIXON and LaRUE NIXON, his wife, operate a cow-calf ranching operation in the metropolis area of Elko County, Nevada and have done so for the last four years or more.

59. The Plaintiff TOM MARVEL RANCHES, INC. is a family owned Nevada corporation which is conducting and has for the last four years conducted a cow-calf ranching operation in the Battle Mountain area, Lander County, Nevada.

60. The Plaintiffs EDWARD TOMERA and YOLE TOMERA, his wife, operate a cow-calf ranching operation in the area of Lee, Elko County, Nevada and have done so for the past four years or more.

61. The Plaintiff U X LIVESTOCK COMPANY is a family owned Nevada corporation, which conducts a cow-calf ranching operation in Ruby Valley, Elko County, Nevada, and has done so for the past four years or more.

62. The Plaintiffs HERBERT UHLIG

and IONA UHLIG, his wife, and ERNEST UHLIG, doing business as UHLIG RANCHES, a co-partnership, organized under the laws of the State of Nevada, conducts a cow-calf operation in the Starr Valley and Metropolis areas of Elko County, Nevada, and has done so for the past four years or more.

63. The Plaintiff RUSSELL S. WEEKS, individually, owns and conducts a cow-calf ranching operation in Clover Valley, Elko County, Nevada and has done so for the past four years or more.

64. The Plaintiffs VERNON H. WESTWOOD and JOAN WESTWOOD, his wife, operate a cow-calf ranching operation in Clover Valley, Elko County, Nevada, and have done so for the past four years.

65. The Plaintiff ARCHIE F. CORBARI, JR., dba WILD HORSE RANCH, conducts a cow-calf ranching operation in Elko, Nevada, and has done so for the past four years or more.

66. The Plaintiffs CALVIN S. WINES and MARGARET M. WINES, his wife, operate a cow-calf ranching operation in Ruby Valley, Elko County, Nevada, and have done so for the past four years or more.

67. The Plaintiffs CAROL WINES and GWEN WINES, his wife, are permitted to run a small cow-calf ranching operation as a benefit of their employment on land owned by their employer and have done so for the past four years or more.

68. The Plaintiff Leonard N. WINES and RUTH WINES, his wife, operate a

cow-calf ranching operation in Ruby Valley, Elko County, Nevada, and have done so for the past four years or more.

69. The Plaintiff JAMES WRIGHT and JOANN WRIGHT, his wife, are conducting, and have for at least the last four years conducted a family cow-calf ranching operation in the Tuscarora area, Elko County, Nevada.

70. The Plaintiffs FRANK ARREGUI and ELENA ARREGUI, his wife, conduct a cow-calf operation in the area of Elko, Nevada, and have done so for more than four years prior to the commencement of this lawsuit.

71. The Plaintiff BAUMAN RANCHES is a family partnership organized under the laws of the State of Nevada,

owned and operated by WALTER E. BAUMANN and ERNEST O. BAUMANN, which conducted for a portion of the last four years a cow-calf ranching operation in Elko, Eureka, and Lander Counties, Nevada.

72. The Plaintiff BAUMANN RANCHES, a partnership, organized under the laws of the State of Nevada, comprised of WALTER E. BAUMANN and JAMES BAUMANN, and has for a portion of the last four years conducted a cow-calf ranching operation in Elko, Eureka, and Lander Counties, Nevada.

73. The Plaintiff MABEL BIEROTH, individually and successor to the interest of HUGH BIEROTH, pursuant to a decree of divorce, entered in the Fourth Judicial District in the State of Nevada in and for the County of

Elko, is conducting and has for at least the last four years, conducted a cow-calf ranching operation in Elko County, Nevada.

74. The Plaintiff RULON E. CHRISTENSEN conducts a cow-calf operation in the area of Elko, Nevada, and has done so for more than four years prior to the commencement of this lawsuit.

75. The Plaintiffs JOHN V. DAMELE and ROBERTA DAMELE, his wife, are conducting and have for at least three of the last four years conducted a family cow-calf ranching operation in Eureka County, Nevada.

76. The Plaintiffs LEO J. DAMELE and ELLEN M. DAMELE, his wife, are conducting and have for at least the last four years, conducted a family

cow-calf ranching operation in Lamoille Elko County, Nevada.

77. The Plaintiff CIRCLE BAR RANCHES, a partnership organized under the laws of the State of Nevada, owned and operated by CHARLES B. EVANS, JR., PEGGY D. EVANS, JOHN W. KRENKA, and WANDA L. KRENKA, his wife, is conducting and has for at least the last two years conducted a cow-calf ranching operation in Ruby Valley, Elko County, Nevada.

78. The Plaintiff DIAMOND LAND AND CATTLE, a partnership organized under the laws of the State of Nevada, owned and operated by THOMAS H. GALLAGHER, DOROTHY S. GALLAGHER, CHARLES DAMELE, R.D. DAMELE and G.W. GARRETT, is conducting and has for at least a portion of the last four

years, conducted a cow-calf ranching operation in Eureka and Elko Counties, Nevada.

79. The Plaintiff DIAMOND CATTLE COMPANY was a partnership organized under the laws of the State of Nevada, owned and operated by RALSTON STREET ASSOCIATES and DENIO BROS. TRUCKING COMPANY, a Nevada corporation. That RALSTON STREET ASSOCIATES was a partnership comprised of HELEN B. METZKER, G.W. GARRETT, MARY LEE FULKERSON, JOHN G. METZKER, JUDITH K. TOPOL, WILLIAM T. METZKER, G.W. GARRETT, Trustee for PAUL W. METZKER, and G.W. GARRETT, Trustee for JAMES S. METZKER. That DENIO BROS. TRUCKING COMPANY, a Nevada corporation is now dissolved and the successor in interest in DENIO BROS. TRUCKING COMPANY, which is a partner-

ship organized under the laws of the State of Nevada, comprised of JUNE MONAGHAN, G.W. GARRETT, ARTHUR TRIEDWASSER, JOHN METZKER and VERNON LINDGREN. That said DIAMOND CATTLE COMPANY conducted a cow-calf ranching operation in Eureka and Elko Counties, State of Nevada, for a portion of the last four years.

80. The Plaintiffs LOUIS DRESSI and KEVAN DRESSI, dba DRESSI RANCHING COMPANY, have operated a cow-calf and cow-steer operation near Elko, Nevada, for more than four years prior to the commencement of this action.

81. The Plaintiffs LeROY ETCHEGARAY and MARY JEAN ETCHEGARAY, his wife, are conducting and have for at least three of the last four years, a family cow-calf ranching operation in Eureka

County, Nevada.

82. The Plaintiffs CHARLES B. EVANS, JR. and PEGGY D. EVANS, his wife, have conducted for at least two of the last four years, a family cow-calf ranching operation in Ruby Valley, Elko County, Nevada.

83. The Plaintiffs MICHAEL H. GALLAGHER and CLARK WILDE, a partnership, have conducted for at least a portion of the last four years, a feeder operation in the State of Arizona.

84. The Plaintiffs MELVIN R. JONES and RACHELE JONES, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation in Elko and Eureka Counties, Nevada.

85. The Plaintiff JULIAN TOMERA

RANCHES, INC. is a Nevada corporation which conducts a cow-calf operation on a ranch located near Elko, Nevada, which it has conducted for more than four years prior to the commencement of this action.

86. The Plaintiffs JOHN W. KRENKA and WANDA L. KRENKA, his wife, have conducted for at least two of the last four years a family cow-calf ranching operation in Ruby Valley, Elko County, Nevada.

87. The Plaintiff LEAR RANCHES is a family partnership organized under the laws of the State of Nevada owned and operated by LOUISE LEAR, KAY S. LEAR and WILLIAM W. LEAR. That WILLIAM W. LEAR is deceased and LOUISE LEAR has succeeded to the interest of WILLIAM W. LEAR. That

said partnership has for at least the last four years conducted a cow-calf ranching operation in Elko County, Nevada.

88. The Plaintiff LEO DAMELE & SONS RANCHES, INC., a Nevada corporation, is a family owned Nevada corporation which has conducted a cow-calf ranching operation in Beowawe, Eureka County, Nevada, for a portion of the last four years.

89. The Plaintiff, LIBERTY LIVESTOCK, a family partnership organized under the laws of the State of Nevada, owned and operated by THOMAS H. GALLAGHER, DOROTHY S. GALLAGHER, J. HARVEY SEWELL and MOLLY S. SEWELL, leased a ranch in Elko and Eureka Counties, Nevada, to DIAMOND CATTLE COMPANY for a portion of the last

four years. The rental being paid to said LIBERTY LIVESTOCK being based upon the amount of income received by DIAMOND CATTLE COMPANY from cattle sales.

90. The Plaintiff, LIBERTY LIVESTOCK, a family partnership organized under the laws of the State of Nevada, owned and operated by THOMAS H. GALLAGHER, DOROTHY S. GALLAGHER, J. HARVEY SEWELL and MOLLY S. SEWELL, which conducted for a portion of the last four years a feeder operation in Eureka County, Nevada.

91. The Plaintiff LUND AND STITZEL, a family partnership, is organized under the laws of the State of Nevada, owned and operated by HARRY LUND, LEORA LUND, DEAN STITZEL and RITA STITZEL, which is conducting

and has for a part of the last four years, conducted a family cow-calf ranching operation in Pine Valley, Eureka County, Nevada.

92. The Plaintiffs WILLIAM B. WRIGHT, JR., LINDA S. WRIGHT and JOHN P. WRIGHT, dba MARY'S RIVER RANCH, A Nevada partnership, is conducting, and have for the last four years conducted, a cow-calf ranching operation in the Deeth area, Elko County, Nevada.

93. The Plaintiff McCORMICK BROTHERS, a family partnership, organized under the laws of the State of Colorado, owned and operated by JAMES L. McCORMICK, JR., and DANIEL M. McCORMICK, which is conducting and has for at least the last four years, conducted the following activities: farming operations, cattle ranches and

feed lots. The farming operation consists of the following: 10,000 acres of farm land located in Kit Carson and Cheyenne Counties, Colorado. Of the 10,000 acres, 3,000 acres are irrigated corn farm land which produces the largest dollar volume crop, and also wheat and alfalfa is produced. These crops are largely consumed in the McCORMICH BROTHERS' feed lot operation. The farming operation has been in constant operation since about 1957.

The feed lot operation is located 160 miles East of Denver, Colorado, just South of Stratton, Colorado, in Kit Carson County. The feed lot operation is conducted on approximately 200 acres of land at that location and has accomodations for up to 20,000

head of cattle.

Over the last five years, the head count at the feed operation has varied from a low of 2,000 cattle in September 1974, to a high of 20,000 in the spring of 1975. The feed lot has been in constant operation since 1962 under my direction.

The McCORMICK BROTHERS CATTLE COMPANY has been in the ranching business since 1956, and its ranching division currently consists of the following operations: a 500,000 acre ranch in Elko, County, with headquarters at Deeth, Nevada, upon which 11,000 head of cattle are located. One Thousand cattle are currently located on 6,000 acres known as the Carson Ranch in Cheyenne County, Colorado.

94. The Plaintiffs CLARA McDERMOTT,

J.R.C. CORPORATION, a Utah corporation, dba TRANS-WORLD ENTERPRISES, dba LAVA RIDGE RANCHES, dba LAVA RIDGE TRUCKING operated ranches in Northern and Central Utah as cow-calf, cow-steer and pure bred bull production facilities and have done so for approximately three years prior to the commencement of this action.

95. The Plaintiff PETER L. MORI is conducting and has for at least the last four years, conducted a family cow-calf ranching operation in Elko County, Nevada.

96. The Plaintiffs JAMES B. MORSE and ESTELLA MORSE, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation in Elko County, Nevada.

97. The Plaintiff PEAVEY CATTLE COMPANY, a family partnership organized under the laws of the State of Nevada, owned and operated by FLORENCE G. PEAVEY, individually, FLORENCE G. PEAVEY as Executrix of the Estate of W.R. PEAVEY, deceased, and CARL O. PEAVEY, which is conducting and has for a portion of the last four years, conducted a cow-calf ranching operation in Elko County, Nevada.

98. The Plaintiff PEAVEY AND SIMS CATTLE COMPANY, a family partnership, organized under the laws of the State of Nevada, owned and operated by FLORENCE G. PEAVEY, individually, FLORENCE G. PEAVEY as Executrix of the Estate of W.R. PEAVEY, deceased and MARTHA F. SIMS, which is conducting and has for a portion of the last four

years conducted a cow-calf ranching operation in Elko County, Nevada.

99. The Plaintiff PEAVEY CATTLE COMPANY, a family partnership organized under the laws of the State of Nevada, owned and operated by W.R. PEAVEY, FLORENCE G. PEAVEY, CARL O. PEAVEY and MARTHA F. PEAVEY, and conducted for a portion of the last four years a cow-calf ranching operation in Elko County, Nevada.

100. The Plaintiff PETER DAMELE AND SON, a family partnership organized under the laws of the State of Nevada, owned and operated by PETER L. DAMELE, LoRAINE DAMELE and BERNARD G. DAMELE, which is conducting and has for at least the last four years conducted a cow-calf ranching operation in Eureka and Lander Counties, Nevada.

101. The Plaintiff FLORENCE G. PEAVEY has operated a cow-calf operation on a ranch located near Wells, Nevada and has done so for more approximately years prior to the commencement of this action, both jointly and in her capacity as Executrix of W. RUSSELL PEAVEY, deceased. W. RUSSELL PEAVEY and FLORENCE G. PEAVEY conducted a cow-calf operation at the same location prior to the time of W. RUSSELL PEAVEY'S death.

102. The Plaintiff JOE PIERETTI an individual is conducting and for at least the last four years conducted a cow-calf ranching operation in Elko and Eureka Counties, Nevada.

103. The Plaintiffs FRANK PRUNTY and MARGE PRUNTY, his wife, are conducting, and have for at least the

last four years conducted, a family cow-calf ranching operation in Elko County, Nevada.

104. The Plaintiff RAND & SON, INC. is a Nevada corporation, operating a cow-calf and cow-steer ranch near Elko, Nevada, and has been for all or a substantial portion of the last four years prior to the commencement of this action.

105. The Plaintiff REED B. ROBISON conducts a cow-calf operation in Ely, Nevada, and has done so since 1973.

106. The Plaintiffs R.D. REYNOLDS and BARBARA REYNOLDS, his wife, operate a cow-calf operation near Wells, Nevada, and have done so for more than four years prior to the commencement of this action.

107. The Plaintiffs THOMAS

GALLAGHER and DOROTHY GALLAGHER conduct a partnership cattle operation known as 765 CATTLE COMPANY on property located near Eureka, Nevada and did so from the years 1969 through 1972.

108. The Plaintiff SMILEY RANCH, a family partnership organized under the laws of the State of Nevada, owned and operated by EDWARD H. SMILEY and JAMES M. SMILEY, which is conducting and has for at least the last four years, conducted a cow-calf ranching operation in Elko County, Nevada.

109. The Plaintiffs NORMAN L. THOMPSON and ELLEN THOMPSON, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation near Elko County, Nevada.

110. The Plaintiff BATTISTA TOMERA,

JR. has conducted a cow-calf operation in Northern Nevada for at least four years prior to the commencement of this action.

111. The Plaintiff TOMERA RANCHING is a family partnership organized under the laws of the State of Nevada owned and operated by BATTISTA TOMERA, JR., GEORGE TOMERA and BATTISTA TOMERA JR., Executor of the Estate of BALSAMINA TOMERA, deceased, and has for at least the last four years conducted a cow-calf ranching operation in Elko and Eureka Counties, Nevada.

112. The Plaintiffs JOHN TOMERA and ANNIE TOMERA, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation in Eureka County, Nevada.

113. The Plaintiff WILLIAM STOCK FARMING CO., a Nevada corporation, is a family owned Nevada corporation which is conducting and has for at least the last four years conducted a cow-calf ranching operation in Humboldt County, Nevada.

114. The Plaintiffs FRANK WINCHELL and BESSIE WINCHELL, his wife, are conducting and have for at least the last four years, conducted a family cow-calf ranching operation in Elko County, Nevada.

115. The Plaintiffs FRANK G. BAKER and TED BAKER, dba BAKER BROS., a partnership organized under the laws of the State of Nevada, are conducting and have for at least the last four years conducted a family cow-calf ranching partnership.

116. The Plaintiff BARNES RANCHES, INC., a Nevada corporation, is a family owned corporation conducting and has for at least the past four years conducted a cow-calf ranching operation in the Jiggs area of Elko County, Nevada.

117. The Plaintiffs DUILIO BOTTARI and ELLA MAY BOTTARI, his wife, are conducting and have for at least the last four years conducted a family cow-calf ranching operation in Elko County, Nevada near Lamoille.

118. The Plaintiffs ANDREW M. BOYD and JACK BOYD, dba BOYD RANCH, a partnership organized under the laws of the State of Nevada, are conducting and have for at least the past four years conducted a family cow-calf ranching operation in Elko County,

Nevada, near Halleck.

119. The Plaintiffs GEORGE W. BROWN and RITA I. BROWN, his wife, conduct a cow-calf operation in Sulpher Springs #3 and have done so for at least four years prior to the commencement of this action.

120. The Plaintiff BYINGTON STEEL TREATING, INC. a Nevada corporation, dba BYINGTON RANCH is conducting and has for at least the past two years conducted a cow-calf ranching operation in Northern Elko County, Nevada near Mountain City.

121. The Plaintiff JOHN W. CLAY, an individual, is conducting and has for at least the past three years conducted a family cow-calf ranching operation in Elko County, Nevada, near Jiggs, Nevada.

122. The Plaintiffs FREDA F. MUNSON and JOHN D. SECRIST, dba DINNER STATION RANCH, a partnership organized under the laws of the State of Nevada, are conducting and have for at least the last four years conducted a feeder operation in Elko County, Nevada, near the Dinner Station.

123. The Plaintiff A. GREER EDWARDS, an individual who for several years prior to 1973 conducted a cow-calf ranching operation in Elko County, Nevada near Halleck.

124. The Plaintiffs JESS GOICOECHEA, ELIAS GOICOECHEA, individually, and as Executors of the Estate of FERNANDO GOICOECHEA, dba FERNANDO GOICOECHEA & SONS, a partnership organized under the laws of the State of Nevada, are conducting and have for

at least the past four years been conducting a family cow-calf ranching operation in Elko County, Nevada, near North Fork.

125. The Plaintiffs GEORGE T. FLINDERS, ELIZABETH L. FLINDERS and THOMAS E. FLINDERS, dba FLINDERS RANCH, a partnership, are conducting and have conducted for at least the past four years a family cow-calf ranching operation organized under the laws of the State of Nevada, near Elberz, Nevada.

126. The Plaintiff WILLIAM H. GIBBS is an individual who has for the past four years and is presently conducting a family cow-calf ranching operation in O'Neil Basin, Elko County, Nevada.

127. The Plaintiffs FRANK W. HOOPER and PHYLLIS HOOPER, his wife, are conducting and have for at least the

past four years been conducting a family cow-calf ranching operation in Elko County, Nevada, near Halleck.

128. The Plaintiff HOWARD RANCHES, INC., a Nevada corporation and S.K. HOWARD and JANECE L. HOWARD, his wife, and NEIL HOWARD and GERRI LYNN WITHERS are conducting and for the past four years have conducted a family cow-calf ranching operation in the Rowland area of Elko County, Nevada.

129. The Plaintiffs RICHARD W. McKAY and ANNA McKAY, his wife, are conducting and have for the last four years conducted a family cow-calf ranching operation in Lander County, Nevada.

130. The Plaintiffs WILLIS PACKER, LOIS PACKER, DEAN RHOADS and SHARON RHOADS, a partnership, organized under

the laws of the State of Nevada, are conducting and have for at least the past four years been conducting a family cow-calf ranching operation in Elko County, Nevada near Tuscarora.

131. The Plaintiff REATA CATTLE COMPANY, a partnership organized under the laws of the State of Nevada, is conducting and has for a least the past four years been conducting a feeder operation in Northern Elko County, Nevada, and the States of California and Arizona.

132. The Plaintiff JOHN J. REED, individually and as Trustee of the Trust of VELMA REED, his wife, deceased, has operated a cow-calf operation for more than four years prior to the commencement of this action near Elko, Nevada.

133. The Plaintiffs ROBERT G. OJEMANN and A. GREER EDWARDS, dba SAVAL RANCHING COMPANY, a partnership organized under the laws of the State of Nevada are conducting and have for at least the past three years conducted a family cow-calf ranching operation in Northern Elko County, Nevada.

134. The Plaintiffs TONY SESTANOVICH and LORRAINE SESTANOVICH, his wife, are conducting and have for at least the past four years been conducting a family cow-calf ranching operation in Eureka County, Nevada in Pine Valley.

135. The Plaintiffs VON L. SORENSEN and MARIAN SORENSEN, his wife, are conducting and have conducted for at least the past four

years a family cow-calf ranching operation in Elko County, Nevada in Clover Valley.

136. The Plaintiffs JESS SUSTACHA and MERILYN SUSTACHA, his wife, are conducting and have for at least the past four years been conducting a family cow-calf ranching operation in Elko County, Nevada, near Lamoille, Nevada.

137. The Plaintiff JACK G. TAYLOR, an individual who has for the past four years been conducting and is conducting a cow-calf ranching operation near Bigs Springs and Clover Valley, Elko County, Nevada.

138. The Plaintiff TAYLORS, LTD., a limited partnership organized under the laws of the State of Nevada, is conducting and has for at least the

past four years been conducting a cow-calf ranching operation in Elko County, Nevada, near Bigs Springs and Clover Valley, Nevada.

139. The Plaintiff MARSHALL W. MORGAN, dba U3 RANCH, is conducting and has for at least the last four years conducted a cow-calf ranching operation in Elko County, Nevada near Wells.

140. The Plaintiff VAN NORMAN RANCHES, INC., a Nevada corporation, is conducting and has for the past four years been conducting a family cow-calf ranching operation in Elko County, Nevada, near Tuscarora.

141. The Plaintiff W&C CATTLE COMPANY, a Nevada corporation, is conducting and has for at least the past four years been conducting a cow-calf

ranching operation in Elko County, Nevada, and in Idaho.

142. The Plaintiff W.H. GIBBS COMPANY, a family owned Nevada corporation, is conducting and has conducted for the past four years a cow-calf ranching operation in the O'Neil Basin area, Elko County, Nevada.

143. The Plaintiffs FARNES G. EGBERT and DELORES EGBERT, his wife, operate a cow-calf operation in the Metropolis area of Elko County, Nevada, and have done so for the past four years or more.

144. The Plaintiff VERNON HAWKES and FREDERICK BELLGARDT, dba HAWKES & BELLGARDT MARY'S RIVER RANCH, a Nevada partnership, organized under the laws of the State of Nevada, and conducting a cow-calf ranching operation and have

done so for the past four years or more.

145. The Plaintiff MARJORIE HOLBROOK, in her own right, and as Executrix of the Estate of BURT HOLBROOK, conducts a cow-calf operation in Metropolis near Wells, Nevada, and has done so for at least four years prior to the commencement of this action.

146. The Plaintiffs CLAIR H. KNUDSEN and KATHLEEN KNUDSEN, his wife, operate a cow-calf operation in the Deeth area of Elko County, Nevada, and have done so for the past four years or more.

147. The Plaintiff ANDREW KNUDSEN and JANET KNUDSEN, dba KNUDSEN RANCH, operate a cow-calf operation in the Metropolis area of Elko County, Nevada and have done so for the past four

years or more.

148. The Plaintiff NEFF RANCH COMPANY, a family owned Nevada corporation, a cow-calf ranching operation in Ruby Valley, Elko County, Nevada, and has done so for the past four years or more.

149. The Plaintiffs BLAINE SHARP and GERTRUDE SHARP, his wife, operate a cow-calf ranching operation in the Ruby Valley area, Elko County, Nevada, and have done so for the past four years or more.

150. The Plaintiffs MAX SPRATLING and JOYCE SPRATLING, his wife, operate a family cow-calf operation near Deeth Elko County, Nevada and have done so for the last four years.

151. The Plaintiffs STEPHEN G. WRIGHT and MAVIS WRIGHT, his wife,

operate a cow-calf ranching operation in the Clover Valley area, Elko County, Nevada, and have done so for the past four years or more.

152. The Plaintiff DAHL, INC., is a Nevada corporation which has for more than the last four years conducted a cow-calf ranching operation near Deeth, Elko County, Nevada.

153. The Plaintiffs PAUL SANSINENA and TERESA SANSINENA conduct a cow-calf operation in Beowawe, Nevada and have done so for at least four years prior to the commencement of this action.

All of the foregoing Plaintiffs who operate cow-calf ranches sell all or a substantial portion of their production through channels of commerce and across state lines and a

substantial portion of their production is purchased by one or more of the Defendants.

The wrongful actions of the Defendants as hereinafter alleged have directly affected the prices at which they have sold all of their cattle during the last four (4) year period. The feed lot and feeder operations referred to above have all purchased cattle which have passed across state lines and sold cattle which have passed across state lines and the purchase and sale of said cattle have constituted all or a substantial portion of the cattle involved in these operations.

The Defendants:

154. SAFEWAY STORES, INC. (hereinafter "Safeway"), a Maryland corpora-

tion with its principal place of business located in Oakland, California is hereby named a Defendant herein. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States with more than 2,400 such stores, the majority of which are located west of the Mississippi River. Safeway's retail food stores sell meat products, including beef. In support of its retail business, Safeway operates extensive distribution and processing facilities including meat distribution warehouses and four meat processing plants.

155. GREAT ATLANTIC & PACIFIC TEA CO., INC. (hereinafter "A&P"), a Maryland corporation with its principal place of business located in Montvale,

New Jersey, is hereby named a Defendant herein. A&P operates the second largest chain of retail food stores in the United States with more than 3,400 such stores in 33 states, the majority of which are located east of the Mississippi River. A&P's retail food stores sell meat products, including beef. In support of its retail business, A&P operates meat distribution warehouses.

156. THE KROGER CO., (hereinafter "Kroger"), an Ohio corporation with its principal place of business in Cincinnatti, Ohio, is named a Defendant. Kroger operates the third largest chain of retail food stores in the United States, the majority of which are located in the midwest and southern areas of the United States. Kroger's retail

food stores sell meat products, including beef. In support of its retail business, Kroger processes food, including beef, for sale by the retail stores.

157. AMERICAN STORES CO., formerly ACME MARKETS, INC. (hereinafter "Acme"), a Delaware corporation with its principal place of business located in Wilmington, Delaware, is hereby named a Defendant. Acme and its subsidiaries operate a chain of more than 700 retail food stores in nine states. Acme's retail food stores sell meat products, including beef. In support of its retail business, Acme operates three meat packing plants.

158. LUCKY STORES, INC. (hereinafter "Lucky"), a California corporation, with its principal place of

business located in Dublin, California, is hereby named a Defendant. Lucky and its subsidiaries operate a chain of more than 200 retail food stores in 28 states which sell meat products, including beef.

159. JEWEL COMPANIES, INC. (hereinafter "Jewel"), a New York corporation, with its principal place of business located in Chicago, Illinois, is hereby named a Defendant. Jewel and its divisions operate a chain of more than 215 retail food stores in the Midwest, New England and northwestern areas of the United States which sell meat products including beef.

160. WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie"), is a Florida corporation with its principal place

of business located in Jacksonville, Florida and is hereby named a Defendant. Winn-Dixie and its divisions operate a chain of more than 970 retail food stores in the United States, and is the eighth largest chain of retail food stores in the United States. In support of its retail business, Winn-Dixie operates various food manufacturing and processing plants and purchases meat products in interstate commerce.

161. FOOD FAIR STORES, INC., (hereinafter "Food Fair"), a Pennsylvania corporation with its principal place of business located in Philadelphia, Pennsylvania, is hereby named a Defendant. Food Fair and its subsidiaries operate a chain of more than 450 retail food stores along the

eastern seaboard area of the United States. Food Fair's retail food stores must sell meat products, including beef. In support of its retail business, Food Fair operates various food manufacturing and processing plants, including one slaughterhouse.

162. GRAND UNION OIL CO. (hereinafter "Grand Union"), a Delaware corporation, with its principal place of business located in Elmwood Park, New Jersey, is hereby named a Defendant. Grand Union and its subsidiaries operate a chain of more than 500 retail food stores in 11 eastern states which must sell meat products, including beef.

163. SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General"),

a Delaware corporation with its principal place of business located in Woodbridge, New Jersey, is hereby named a Defendant. Supermarkets General operates a chain of more than 100 retail food stores under the "Pathmark" name in six northeastern states which sell meat products, including beef.

164. ALBERTSON'S, INC. (hereinafter "Albertson's"), a Nevada corporation, with its principal place of business in Boise, Idaho, is hereby named a Defendant. Albertson's operates more than 300 stores in 17 western states and further participates in a food product joint venture through its wholly-owned subsidiary Texas-Albertson's, Inc., with Defendant Skaggs Companies, Inc., known as

MOUNTAIN STATES WHOLESALE COMPANY. Albertson's retail food stores sell meat products, including beef, in aid of their retail operations and purchase the same in interstate commerce.

165. ARDEN-MAYFAIR, INC. (hereinafter "Mayfair"), a Delaware corporation with its principal place of business in Los Angeles, California, is hereby named a Defendant. Mayfair operates more than 183 retail food stores in the Western United States and these stores sell meat products including beef, in support of its retail operations and it purchases same in interstate commerce.

166. CIRCLE K. CORPORATION (hereinafter "CKP"), a Texas corporation, with its principal place of business

in Phoenix, Arizona, is hereby named a Defendant. KCP operates over 1,000 retail food stores in the Western United States and these stores sell meat products, including beef, in aid of their retail store operations and purchase the same in interstate commerce.

167. SKAGGS COMPANIES, INC. (hereinafter "Skaggs"), a Delaware corporation, with its principal place of business in South Salt Lake City, Utah is hereby named a Defendant. Skaggs operates a chain of retail self-service drug stores in the Midwestern and Intermountain areas of the United States. Skaggs retail food stores sell meat products, including beef. Skaggs further participates in a joint venture through its wholly-owned

subsidiary Texas Skaggs, Inc. with Defendant Albertson's, Inc. which operates grocery-drug supermarkets in Texas, Oklahoma, Florida, Louisiana and Arkansas.

168. THRIFTMART, INC. (hereinafter "Thriftmart"), a California corporation with its principal place of business in Los Angeles, California, is hereby named a Defendant. Thriftmart operates more than 60 retail supermarkets in Southern California and Nevada which sell meat products, including beef. Thriftimart also operates a meat storage and distribution plant.

169. NATIONAL ASSOCIATION OF FOOD CHAINS (hereinafter "NAFC"), located in Washington, D.C. is hereby named a Defendant. NAFC is an unincorpor-

ated trade organization whose members are the largest retail food chains in the United States; small food companies and independents are not eligible for membership. The retail food chains that comprise the membership of NAFC are the largest purchasers of carcass beef in the United States.

170. NATIONAL PROVISIONER, INC. (hereinafter "National Provisioner"), located in Chicago, Illinois, is hereby named a Defendant. National Provisioner, a New York corporation, published market advisory services including the "Yellow Sheet", a publication listing the prices of beef during the various time periods.

171. The Defendant JEWEL COMPANIES, INC., a New York corporation with its principal place of business located

in Chicago, Illinois, operates a chain of more than 375 retail food stores in the Midwest, New England and the Northwest areas of the United States, which sell meat products, including beef.

172. The Defendant NATIONAL TEA COMPANY, an Illinois corporation with its principal place of business at 1000 North Crosby Street, Chicago, Ill., is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets.

173. The Defendant STOP & SHOP, INC., a Massachusetts corporation, with its principal place of business at 393 D Street, Boston, Massachusetts, is a member of the National Association of Food Chains and as a retailer

grocer throughout the country, acquires meat for its retail outlets.

174. The Defendant ALLIED SUPER-MARKETS, INC., a Delaware corporation, with its principal place of business at 8711 Meadowdale, Detroit, Michigan, is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets.

175. The Defendant FIRST NATIONAL STORES, INC., a Massachusetts corporation with its principal place of business at 5 Middlesex Avenue, Somerville, Massachusetts, is a member of the National Association of Food Chains, and as a retail grocer, acquires meat for its retail outlets from throughout the Western United States.

176. The Defendant COLONIAL STORES, INC., a Virginia corporation with its principal place of business at 2251 North Sylvan Road, Atlanta, Georgia, is a member of the National Association of Food Chains, and as a retail grocer throughout the country, acquires meat for its retail outlets.

177. The Defendant PUEBLO INTERNATIONAL, INC., a Delaware corporation, having its principal place of business at 375 Park Avenue New York, New York 10017, is a member of the National Association of Food Chains, and as a retail grocer throughout the country, acquires meat for its retail outlets.

178. Various other companies, firms associations, and individuals not now made Defendants in this Amended

Complaint participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof.

III

NATURE OF TRADE AND COMMERCE

1. Cattle are raised on farms and ranches such as those owned and operated by Plaintiffs herein. Commercial cow-calf ranching operations produce the calves and steers which are fattened, slaughtered, processed and later sold by retail food stores to consumers in the form of fresh, frozen or processed beef products. The cow-calf producers sell their cattle either to feedlots where the calves and steers are fattened for slaughter, or directly to slaughterhouses and meat packers. The feedlot operators

take calves or yearlings and feed them a concentrate ration for fast growth and fattening until they are ready for slaughter as fat cattle. These cattle are then sold at weights on the average of 900 to 1,100 pounds to meat packers for slaughter. The commercial slaughterhouses or meat packers slaughter the cattle and process the beef carcasses for sale to retail food stores.

2. Many retail food chains, including the Defendant food chains named herein and other co-conspirators engaged in centralized buying, whereby beef purchases can be made for the entire chain or a substantial part thereof from one or more central locations. Specifications are established by the Defendant retail food

chains and other co-conspirators for the beef they buy.

In most instances, the specifications for beef carcasses or parts thereof vary among the different Defendant food chains and other co-conspirators.

Packers in various parts of the United States, including many in the State of Nevada, regularly make available beef carcasses and parts thereof meeting the speficiations of the Defendant retail chain stores and other merchandisers of beef. The Defendant chain stores state to these packers, often a week or more in advance of the actual availability of the dressed beef, the quantity and price of the beef upon which Defendants will accept delivery. It is agreed-

upon monopsony practice of these Defendant chain stores, who have dominant market power, to offer the packers a price substantially lower than those offered by other merchandisers of beef who do not have such dominant market power.

Various of the Defendant major retail chain stores bid to the packers in Nevada and elsewhere on different days of the week.

The meat packing business is a volume operation whereby packers minimize costs by maximizing output. Most packers do not have the warehousing facilities to store perishable beef over an extended period of time and must ship their daily carcass production within 24 to 28 hours after slaughter. The dominant retail food

chains maintain extensive warehousing facilities and can utilize storage space to take advantage of low prices as a lever to bargain against packers as prices strengthen. Through means and manipulation of the Yellow Sheet published by Defendant National Provisioner, retail food chains keep informed about beef prices, calculate the prices they will pay, communicate the prices to each other and use the said Yellow Sheet as a tool to purchase beef from the packers at artificially low prices.

3. The price of beef dictated by the retail food chains to the packers directly determines the price which cattle producers such as Plaintiffs realize on the sale of their cattle. The price squeeze on the

packers by the Defendant dominant retail food chains results in turn in a lower price to the cattle producers such as the Plaintiffs. The price of calves, steers and fat cattle is depressed as the price of beef is held stable or pushed down by the Defendant retail food chains and other major food chains.

4. During the period of time covered by this Complaint, Defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf and steer producing states from and into Nevada and from and into other surrounding states. Most

livestock slaughtering plants are located near the areas of livestock production and feeding. Northern Nevada is a major area of livestock production and feeding. Most of the beef production from Northern Nevada moves across state lines to packers located mainly in the following six (6) areas: Los Angeles, California; San Francisco, California; Seattle, Washington; Southern Idaho; Denver, Colorado and Salt Lake City, Utah. The Defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous shipment of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce.

Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed food.

IV

OFFENSES CHARGED

1. Beginning at a date unknown to Plaintiffs, but at least as early as 1963, and continuing up to the date of the filing of this complaint, the Defendants and co-conspirators, through meetings arranged and conducted by the Defendant National Association of Food Chains and by other means, have engaged and are now engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade

and commerce in cattle and fresh, frozen and processed beef, and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize both unilaterally and jointly such trade and commerce in violation of Section 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

2. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize, the monopolization and the attempt to monopolize such trade and commerce, have consisted of a continuing course of conduct, plans, agreements and concerts of action by and among Defendants and their co-conspirators, the substantial

terms, purpose and intent of which have been to:

(a) Fix, stabilize and maintain at uniform, noncompetitive and artificially low prices the price paid to Plaintiffs and to slaughterhouses and meat packers for fresh, frozen and processed beef to the extent that the prices have been fixed at the packers' retail level. Said prices have been pushed back to the Plaintiffs on contracts which amount to cost less fixed profit arrangements, with the packers usually paying the Plaintiffs a price per pound equal to sixty-two percent of the price which the packers received from the chain stores. Those Plaintiffs who did not sell directly to packers, nevertheless, received a fixed cost less profit amount which

was directly dependant upon the amount which the retail Defendants paid to the packers;

(b) Charge noncompetitive and artificially high prices for fresh, frozen and processed beef sold at retail to consumers which had the effect of reducing beef consumption. Said reduction in beef consumption caused Plaintiffs to "hold over" their cattle and not send them to slaughter, and increased the unit cost of production; and, in addition, several of the Plaintiffs who own and operate feedlots suffered the loss of cattle because they were unable to sell the cattle in feedlots and said cattle died. In addition, because of the reduction in consumption, smaller packers and

slaughterhouses were reduced in number, thus creating fewer outlets for the Plaintiffs to sell their cattle. This has created in the cattlemens' area of the economy, a breakdown of competitive conditions which has endangered the economy and has damaged Plaintiffs. The effect of the Defendants' actions in maintaining non-competitive and artificially high prices could reasonable be foreseen to affect the Plaintiffs and the area of the economy in which they operate, thus, the Defendants conspired to fix prices at the retail level usually on a formula that guaranteed the retail chain stores a twenty percent gross margin. The Defendant retail chain stores restrained trade and a substantial reduction

in demand occurred because consumers chose to purchase other products to meet their protein requirements. The cross-elasticity of demand of fresh beef is high at the retail level; however, the retail chains increased their profits since the twenty percent fixed gross profit margin was applied to a substantially bigger retail price. The Plaintiffs suffered because of the decrease in demand and surplus of supplies and they were effectively eliminated from the market for a substantial period of time during the last four years. The conspiracy to fix prices at the retail level which thus decreased the demand, had a direct and substantial affect on the Plaintiffs' property, trade and business and upon interstate commerce and

is a separate market restraint from the wholesale price-fixing allegations herein set forth;

(c) Utilize market dominance and economic power to depress and maintain at artifially low and constant levels the farm wholesale price margin or spread when the wholesale-retail price margin or spread is and has been experiencing consistent increases and unexplained, noncost justified, abrupt rises such as occurred to a greater extent in 1969 and 1973 and to a lesser extent over the last twenty year period;

(d) The Defendants' retail chain stores have exercised monopsony power which is fundamentally conceptionally different from monopoly power. The packers have conspired

directly with the retail stores in this regard and have agreed to implement the conspiracy by supporting "The Yellow Sheet" and supplying sales quotes on a selective nonrealistic basis to influence the conspiracy;

(e) Eliminate price competition for fresh, frozen and processed beef by employing a system of price leadership whereby Safeway on the West Coast and A&P on the East Coast and other co-conspirators at other times and places set prices by accepting bids from packers one day in advance of all other retail food chains who thereafter follow the prices established by the dominant firms;

(f) Eliminate price competition for fresh, frozen and processed beef

by employing "The Yellow Sheet" published by Defendant National Provisioner as a device to communicate the price paid in the different areas of the United States and thereby stabilize the prices throughout the United States;

(g) Manipulate "The Yellow Sheet" information gathering methods so that "The Yellow Sheet" reflects artificially low and inaccurate prices paid for beef carcasses and parts thereof;

(h) Hold meetings among their own agents and employees and with each other and with those of the co-conspirators including packers for the purpose of implementing, designating, organizing and carrying out all of the conspiracies alleged herein until prices were satisfactory to

them and until the packers agreed to join in conspiracy;

(i) Purchase large portions of hind quarters, leaving excesses of front quarters and then purchasing the front quarters at substantially decreased prices.

In all instances and on all occasions, the Defendants conspired to implement the conspiracies and monopolies and all other acts heretofore alleged with the packers in any given area where they purchased beef, and the packers and the named Defendants are joint co-conspirators as to all wrongful acts complained of.

V

FRAUDULENT CONCEALMENT

1. The Defendants and co-conspirators respectively fraudulently con-

cealed the existence of their combination and conspiracy by various means used to avoid the detection thereof, including express denials on the public records under oath of meeting together to discuss meat pricing and, as a result of such concealment, the Plaintiffs and each of them, had no knowledge and could not, by the exercise of reasonable diligence, have obtained the knowledge of the existence of the combination and conspiracy until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the Defendant co-conspirators did not indeed meet together to discuss the pricing of beef.

2. By virtue of this fraudulent concealment, Plaintiffs, and each of them, assert the tolling of the applicable statute or period of limitations affecting Plaintiffs' rights to action hereof.

VI

INJURY TO PLAINTIFFS

1. As a direct and proximate result of the unlawful acts and conduct of Defendants and co-conspirators hereinbefore alleged, Plaintiffs variously have suffered injury to their business and property as follows:

(a) Loss of and reduction in value of their respective businesses;

(b) Loss and decrease in profits which would have otherwise been earned;

(c) Increased expenses per unit of beef product; decreased production

and profitability which have caused losses and have prevented ordinary business expansion which would otherwise have occurred, thus resulting in additional losses of profits which would otherwise have accrued if such expansion could have occurred.

2. The price extent of the aforesaid damages are not presently known and Plaintiffs hereby pray leave of court to amend this said amount as has been ascertained.

VII

CONSUMER RETAIL PRICE FIXING CLAIM

1. Because of the complexities of the packing industry and the specialization needed to slaughter, properly cut, wrap and preserve beef, most of the beef consumed by the Plaintiffs herein is and has been

purchased at retail from chain stores, and most of said beef is and has been purchased from the Defendants herein at retail.

2. Most of the Plaintiffs provide beef at the Plaintiffs' cost to the Plaintiffs' ranch hands as part of their compensation; therefore, the Plaintiffs, their families and ranch hands for whom they provide beef, constitute a group of individuals of a yearly average of approximately 765 persons. For example, the DUCKWATER SHOSHONE TRIBE purchases beef retail for its tribal members in substantial amounts from the Defendants.

3. The Plaintiffs have purchased beef at their own expense for these individuals (family, ranch hands) during the last four years. Over

that period of time, each of the individuals in this group has consumed 80 pounds per year each, for a total amount of beef purchased by the Plaintiffs during this period of 61,200 pounds.

4. Part of the conspiracy as heretofore and herein alleged which has been undertaken and which is ongoing on the part of the Plaintiffs is that they have conspired with each other and with others not listed as Defendants in this suit to establish an artificially high price for retail beef sales which was directly affected the Plaintiffs herein.

5. Because of the knowledge of the exact amount by which the Plaintiffs have fixed the beef prices at retail above the ordinary level

which would have prevailed but for the conspiracy of the Defendants is exclusively within the ambit of the Defendants' records, the Plaintiffs are not sure as to the exact amount by which the price has been artificially raised, but their preliminary economic studies lead them to conclude it has been an average of approximately 50¢ per pound during the relevant period.

6. Therefore, the Plaintiffs have been damaged in the total amount of $30,600.00, and the Plaintiffs are entitled to a judgment under Section 1 of the Sherman Act for this amount, which judgment should be trebled pursuant to Section 4 of the Clayton Act, and the Plaintiffs should be granted judgment for a reasonable

attorney's fee and/or costs of court in conjunction with this retail price fixing claim.

WHEREFORE, Plaintiffs pray that this Court, in conjunction with the Plaintiffs' claim for retail price fixing, adjudge and decree that:

1. Plaintiffs have judgment against the Defendants jointly and severally for $30,600.00, or such other amount as the facts actually support by way of retail price fixing;

2. That said amount be trebled to $91,800.00;

3. For a reasonable attorney's fee;

4. For costs of court herein;

5. For an Order enjoining the Defendants from further fixing retail prices.

WHEREFORE, Plaintiffs pray that this Court, in conjunction with the Plaintiffs' wholesale meat producing operations, adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2).

2. Plaintiffs, and each of them, having been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States.

3. Plaintiffs, and each of them,

recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. Section 15).

4. Plaintiffs, and each of them, recover the costs of suit, together with attorney's fees as provided by Section 4 of the Clayton Act (14 U.S.C. Section 15).

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. Section 26).

6. Plaintiffs be awarded such other and further relief as this Court may deem just and proper.

DATED this 27th day of September, 1977.

ROBINSON, GUYON, SUMMERHAYS
& BARNES
LAW OFFICES OF JERROLD N.
OFFSTEIN
VAUGHAN, HULL, MARFISI &
MILLER
EVANS & BILYEU
WILSON, WILSON & BARROWS, LTD.
AMES & CORN, LTD.
ROSS P. EARDLEY, ESQ.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH,

CENTRAL DIVISION

CHAPARRAL CATTLE CORP., an Arizona corporation; CHAPARRAL CATTLE CORP., et al., dba NB CATTLE COMPANY, a Partnership; THOMAS C. NOONAN, JR.; T. CLIFFORD NOONAN, SR.; GEORGE HANZI, STEPHEN H. SCOTT; CHARLES M. SCOTT; DONALD N. REEVES; DALE HAROLDSEN; JOHN S. GLEASON; JOHN S. GLEASON; MARY JANE GLEASON and JOSEY CORPORATION, a Nevada corporation, dba TOIYABE CATTLE COMPANY, a Partnership; NOONAN ASSOCIATES, a Nevada corporation, and	COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE FEDERAL ANTITRUST LAWS

ASOCIACION DE SOCIERADES LOCALES DE CREDITO GANADERO LIZENCIADO LUIS ECHEVERRIA ALVAREZ DE R.I., an unincorporated Mexican association,	
Plaintiffs,	
vs.	(JURY DEMANDED)
SAFEWAY STORES, INCORPORATED, a Maryland corporation; GREAT ATLANTIC & PACIFIC TEA COMPANY, a Maryland corporation; THE KROGER COMPANY, an Ohio corporation; AMERICAN STORE COMPANY, fna ACME MARKETS, INC., a Delaware corporation; LUCKY STORES INC., a California corporation; JEWEL COMPANIES, INC., a New York corporation; WINN-DIXIE STORES Inc., a Pennsylvania corporation; GRAND UNION COMPANY, a Delaware corporation; SUPERMARKETS GENERAL CORPORATION, a Delaware corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, an unincorporated association; NATIONAL PROVISIONER, INCORPORATED, a New York corporation; ALBERTSON'S, INC., a Nevada corporation; ARDEN-MAYFAIR, INC., a Delaware corporation;	CIVIL NO. C-76-7

CIRCLE K CORPORATION, a Texas corporation; SKAGGS COMPANIES, INC., a Delaware corporation; THRIFTI MART, INC., a California corporation; ALLIED SUPER MARKETS, INC., a Delaware corporation; P. BORMAN, INC., a Delaware corporation, COLONIAL STORES, INC., a Virginia corporation; FIRST NATIONAL STORES, INC., a Massachusetts corporation; NATIONAL TEA COMPANY, an Illinois corporation; PENN FRUIT COMPANY, a Delaware corporation; PUEBLO INTERNATIONAL, INC., a Delaware corporation; STOP AND SHOP, INC., a Massachusetts corporation; and SUPER VALU STORES, INC., a Delaware corporation,

Defendants.

Plaintiffs, by their attorneys, bring this civil action against the above-named Defendants for treble the amount of damages suffered by them by reason of the Defendants' violations of the antitrust laws of the United States,

and demanding a trial by jury, complain and allege as follows:

I

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named Defendants for violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, (15 U.S.C. Sections 1 and 2) entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act. Plaintiffs also seek treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15 and 26).

2. Each of the Defendants or its agents maintains offices, transacts business, has transacted business,

is found within the State of Utah, or has conspired with Defendants which are found within the State of Utah and engaged in a scheme which has directly and substantially affected meat prices in the State of Utah and is part of a nationwide scheme to so affect meat prices and therefore have subjected themselves to the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in furtherance of violations of the antitrust laws, as hereinafter alleged, have been performed within the State of Nevada. The interstate trade and commerce described hereinafter is carried on in part within the State of Utah.

II

PARTIES

Plaintiffs.

1. The Plaintiff CHAPARRAL CATTLE CORP., an Arizona corporation, commenced activities in the ranching and feed lot businesses and continues to do so to the present time. These business entities are located in Arizona, Nevada and California. Chaparral Cattle Corp. also manages ranches and feed lot operations.

2. The Plaintiff CHAPARRAL CATTLE CORP., et al., dba NB CATTLE COMPANY, a Partnership, owns cattle in Mexico and operates a cow-steer operation there on leased ranches, namely in the states of Sonora and Chihuahua, Mexico. This Partnership also conducts a steer operation which consists of purchased steers which are fed both on grass and in feed lots in the states

of Arizona and California which are operated on leased property.

3. The Plaintiff THOMAS C. NOONAN, JR. operates a sole proprietorship consisting of a fat streer operation in feed lots in Arizona and California.

4. The Plaintiff T. CLIFFORD NOONAN, SR. operates a sole proprietorship consisting of a fat steer operation in feed lots in Arizona and California.

5. The Plaintiff GEORGE HANZI operates a sole proprietorship consisting of a fat steer operation in feed lots in Arizona and California.

6. The Plaintiff STEPHEN H. SCOTT operates a sole proprietorship consisting of a fat steer operation in feed lots in Arizona and California.

7. The Plaintiff CHARLES M. SCOTT operates a sole proprietorship consisting

of a fat steer operation in feed lots in Arizona and California.

8. The Plaintiff DONALD N. REEVES operates a sole proprietorship consisting of a fat steer operation in feed lots in Arizona and California.

9. The Plaintiff DALE HAROLDSEN operates a sole proprietorship consisting of a fat steer operation in feed lots in Arizona and California.

10. The Plaintiff JOHN S. GLEASON operates a sole proprietorship consisting of a fat steer operation in feed lots in Arizona and California.

11. JOHN S. GLEASON, MARY JANE GLEASON and JOSEY CORPORATION, a Nevada corporation, dba TOIYABE CATTLE COMPANY, a Partnership, conducts a steer operation with steers which are purchased from independent operators and fed on ranches

owned by Toiyabe Cattle Company in the State of Nevada and also leased property in Arizona and California. Toiyabe Cattle Company also leases ranches and feeds out cattle on a contract basis in feed lots located in Nevada, California and Arizona.

12. NOONAN ASSOCIATES, a Nevada corporation, operates the same type of operation as Toiyabe Cattle Company, except that it does not own any of its own property but also feeds out cattle on grass lands which are leased.

13. ASOCIACION DE SOCIEBADES LOCALES DE CREDITO GANADERO LIZENCIADO LUIS ECHEVERRIA ALVAREZ DE R.I., an unincorporated Mexican association, is the owner of a large number of cattle which are fed on ranches, brought to a weight of approximately 750 pounds,

and at that point are relocated to feed lots where they are fed up to a weight of approximately 1,050 pounds, whereupon they are sold for slaughter. These operations occur in the states of California, Nevada, Arizona, Oregon, Montana, Wyoming, Colorado, Texas, and New Mexico.

All of the foregoing Plaintiffs sell all or a substantial portion of their production through channels of commerce and across state lines and most of their production is purchased by the Defendants.

Defendants.

14. The Defendant SAFEWAY STORES, INCORPORATED, a Maryland corporation (hereinafter "Safeway"), with its principal place of business located in Oakland, California, is hereby

named a defendant herein. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States with more than 2,400 such stores, the majority of which are located west of the Mississippi River. Safeway's retail food stores sell meat products, including beef. In support of its retail business, Safeway operates extensive distribution and processing facilities including meat distribution warehouses and four meat processing plants.

15. The Defendant GREAT ATLANTIC & PACIFIC TEA COMPANY, a Maryland corporation, (hereinafter "A & P"), with its principal place of business located in Montvale, New Jersey, is hereby named a defendant herein. A & P operates the second largest chain of

retail food stores in the United States with more than 3,400 such stores in 33 states, the majority of which are located east of the Mississippi River. A & P's retail food stores sell meat products, including beef. In support of its retail business, A & P operates meat distribution warehouses.

16. The Defendant THE KROGER COMPANY, an Ohio corporation (hereinafter "Kroger"), with its principal place of business in Cincinnati, Ohio, is hereby named a defendant. Kroger operates the third largest chain of retail food stores in the United States, the majority of which are located in the midwest and southern areas of the United States. Kroger's retail food stores sell meat products, including beef. In support of its retail business, Kroger processes

food, including beef, for sale by the retail stores.

17. The Defendant AMERICAN STORE COMPANY, fna ACME MARKETS, INC., a Delaware corporation (hereinafter "Acme"), with its principal place of business located in Wilmington, Delaware, is hereby named a Defendant. Acme and its subsidiaries operate a chain of more than 700 retail food stores in nine states. Acme's retail food stores sell meat products, including beef. In support of its retail business, Acme operates three meat packing plants.

18. The Defendant LUCKY STORES, INC., a California corporation (hereinafter "Lucky"), with its principal place of business located in Dublin, California, is hereby named a defendant. Lucky and its subsidiaries operate a chain of more

than 200 retail food stores in 28 states which sell meat products, including beef.

19. The Defendant JEWEL COMPANIES, INC., a New York corporation (hereinafter "Jewel"), with its principal place of business located in Chicago, Illinois, is hereby named defendant. Jewel and its divisions operate a chain of more than 215 retail food stores in the midwest, New England and northwestern areas of the United States which sell meat products including beef.

20. The Defendant WINN-DIXIE STORES, INC., a Florida corporation (hereinafter "Winn-Dixie"), with its principal place of business located in Jacksonville, Florida, is hereby named a defendant. Winn-Dixie and its divisions operate a chain of more than 970 retail food stores in the southeastern United States,

and is the eighth largest chain of retail food stores in the United States. In support of its retail business, Winn-Dixie operates various food manufacturing and processing plants and purchases meat products in interstate commerce.

21. The Defendant FOOD FAIR STORES, INC., a Pennsylvania corporation (hereinafter "Food Fair"), with its principal place of business located in Philadelphia, Pennsylvania, is hereby named a defendant. Food Fair and its subsidiaries operate a chain of more than 450 retail food stores along the eastern seaboard area of the United States. Food Fair's retail food stores sell meat products, including beef. In support of its retail business, Food Fair operates various food manufacturing

and processing plants, including one slaughterhouse.

22. The Defendant GRAND UNION COMPANY, a Delaware corporation (hereinafter "Grand Union"), with its principal place of business located in Elmwood Park, New Jersey, is hereby named a defendant. Grand Union and its subsidiaries operate a chain of more than 500 retail food stores in eleven eastern states which sell meat products, including beef.

23. The Defendant SUPERMARKETS GENERAL CORPORATION, a Delaware corporation (hereinafter "Supermarkets General"), with its principal place of business located in Woodbridge, New Jersey, is hereby named a defendant. Supermarkets General operates a chain of more than 100 retail food stores under the "Path-

mark" name in six northeastern states which sell meat products, including beef.

24. The Defendant NATIONAL ASSOCIATION OF FOOD CHAINS, an unincorporated association (hereinafter "NAFC"), located in Washington, D.C. is hereby named a defendant. NAFC is an unincorporated trade organization whose members are the largest retail food chains in the United States; small food companies and independents are not eligible for membership. The retail food chains that comprise the membership of NAFC are the largest purchasers of carcass beef in the United States.

25. The Defendant NATIONAL PROVISIONER, INCORORATED, a New York corporation (hereinafter "National Provisioner"), located in Chicago, Illinois, is hereby named a defendant. National Provisioner

publishes market advisory services including "The Yellow Sheet", a publication listing the prices of beef during various time periods.

26. The Defendant ALBERTSON'S, INC., a Nevada corporation (hereinafter "Albertson's"), with its principal place of business in Boise, Idaho, is hereby named a defendant. Albertson's operates more than 300 stores in 17 western states and further participates in a food product joint venture through its wholly owned subsidiary Texas-Albertson's, Inc., with Defendant Skaggs Companies, Inc., known as MOUNTAIN STATES WHOLESALE COMPANY. Albertson's retail food stores sell meat products, including beef, in aid of their retail operations and purchase the same in interstate commerce.

27. The Defendant ARDEN-MAYFAIR, INC.,

a Delaware corporation (hereinafter "Mayfair"), with its principal place of business in Los Angeles, California, is hereby named a defendant. Mayfair operates more than 183 retail food stores in the Western United States, and these stores sell meat products, including beef, in support of its retail operations and it purchases same in interstate commerce.

28. The Defendant CIRCLE K CORPORATION, a Texas corporation (hereinafter "CKP"), with its principal place of business in Phoenix, Arizona, is hereby named a defendant. CKP operates over 1,000 net food stores in the Western United States, and these stores sell meat products, including beef, in aid of their retail store operations and purchase the same in interstate commerce.

29. The Defendant SKAGGS COMPANIES, INC., a Delaware corporation (hereinafter "Skaggs"), with its principal place of business in South Salt Lake City, Utah, is hereby named a defendant. Skaggs operates a chain of retail self-service drug stores in the Midwestern and Inter-mountain areas of the United States. Skaggs retail food stores sell meat products, including beef. Skaggs further participates in a joint venture through its wholly owned subsidiary Texas-Skaggs, Inc. with Defendant Albertson's, Inc. which operates grocery-drug supermarkets in Texas, Oklahoma, Florida, Louisiana and Arkansas.

30. The Defendant THRIFTI MART, INC., a California corporation (hereinafter "Thriftimart"), with its principal place of business in Los Angeles, California,

is hereby named a defendant. Thriftimart operates more than 60 retail supermarkets in Southern California and Nevada, which sell meat products, including beef. Thriftimart also operates a meat storage and distribution plant.

31. The Defendant ALLIED SUPER MARKETS, INC., a Delaware corporation (hereinafter "Allied"), with its principal place of business at 8711 Meadowdale One, Detroit, Michigan 48228, is hereby named a defendant. Allied is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. The Defendant Allied engaged in the sale, purchase, or distribution of fresh,

frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

32. The Defendant P. BORMAN, INC., a Delaware corporation (hereinafter "P. Borman"), with its principal place of business at P.O. Box 446, Detroit, Michigan 48232, is hereby named a defendant. P. Borman is a member of the National Association of Food Chains and as a retail grocer throughout the country acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. The Defendant P. Borman engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat

products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

33. The Defendant COLONIAL STORES, INC., a Virginia corporation (hereinafter "Colonial Stores"), having its principal place of business at 2251 North Sylvan Road, Atlanta, Georgia, 30302, is hereby named a defendant. The Defendant Colonial Stores is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. Defendant Colonial Stores engaged in the sale, purchase or distribution of fresh, frozen or processed meat and

meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

34. The Defendant FIRST NATIONAL STORES, INC., a Massachusetts corporation (hereinafter "First National"), having its principal place of business at 5 Middlesex Avenue, Somerville, Massachusetts 02143, is hereby named a defendant. Defendant First National is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. Defendant First National engaged in the sale, purchase or distribution of fresh,

frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

35. The Defendant NATIONAL TEA COMPANY, an Illinois corporation (hereinafter "National Tea"), having its principal place of business at 1000 North Crosby Street, Chicago, Illinois 60610, is hereby named a defendant. The Defendant National Tea is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. Defendant National Tea engaged in the sale, purchase or distribution of fresh,

frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

36. The Defendant PENN FRUIT COMPANY, a Delaware corporation (hereinafter "Penn Fruit"), having its principal place of business at Grant Avenue and Blue Glass Road, Philadelphia, Pennsylvania 19115, is hereby named a defendant. The Defendant Penn Fruit is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. Defendant Penn Fruit engaged in the sale, purchase, or distribution of fresh,

frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

37. The Defendant PUEBLO INTERNATIONAL, INC., a Delaware corporation (hereinafter "Pueblo International"), having its principal place of business at 375 Park Avenue, New York, New York 10017, is hereby named a defendant. The Defendant Pueblo International is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. The Defendant Pueblo International engaged in the sale, purchase or distribution

of fresh, frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

38. The Defendant STOP AND SHOP, INC., a Massachusetts corporation (hereinafter "Stop and Shop"), having its principal place of business at 393 D Street, Boston, Massachusetts 02210, is hereby named a defendant. The Defendant Stop and Shop is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. Defendant Stop and Shop engaged in the

sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

39. The Defendant SUPER VALU STORES, INC., a Delaware corporation (hereinafter "Super Valu Stores"), having its principal place of business at 101 Jefferson Avenue, Hopkins, Minnesota 55343, is hereby named a defendant. The Defendant Super Valu Stores is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered throughout the Southwestern United States. The Defendant Super Valu Stores

engaged in the sale, purchase of distribution of fresh, frozen or processed meat and meat products derived from the Southwestern United States, and this cause of action grows out of such sale, purchase or distribution of meat and meat products.

40. Various other companies, firms, associations, and individuals not now made Defendants in this Complaint participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof.

III

OTHER SIMILAR SUITS

There are six similar cases presently pending throughout the United States. They are:

(a) Petersen, et al. v. Safeway

Stores, Inc., et al., Civil No. C-75-0984-RFP;

(b) Pony Creek Cattle Company, Inc., et al., v. The Great Atlantic & Pacific Tea Company, et al., Civil No. CA 3-75-0702-C;

(c) Lowe, et al. v. Safeway Stores, Inc., et al., Civil No. C-75-4043;

(d) Meat Price Investigators Association, et al., v. Safeway Stores, Inc., et al., Civil No. C-75-333-2;

(e) Agee, et al., v. Safeway Stores, Inc., et al., Civil No. R-75-224-BRT;

(f) Black, et al., v. Acme Markets, Inc., et al., Civil No. CA 2-75-186.

There has been a Motion to Consolidate these cases which is presently pending before the Multidistrict Panel.

IV

NATURE OF TRADE AND COMMERCE

1. Cattle are raised on farms and ranches such as those owned and operated by Plaintiffs herein. Commercial cow-calf ranching operations produces the calves and steers that are fattened, slaughtered, processed and later sold by retail food stores to consumers in the form of fresh, frozen or processed beef products. The cow-calf producers sell their cattle either to feedlots where the calves and steers are fattened for slaughter, or directly to slaughter-houses and meat packers. The feedlot operators take calves or yearlings and feed them a concentrate ration for fast growth and fattening until they are ready for slaughter as fat cattle. These cattle are then sold at weights on the average

of 900 to 1100 pounds to meat packers for slaughter. The commercial slaughterhouses or meat packers slaughter the cattle and process the beef carcasses for sale to retail food stores.

2. Many retail food chains including the Defendant food chains named herein and other co-conspirators engage in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof from one or more central location. Specifications are established by the Defendant retail food chains and other co-conspirators for the beef they buy.

In most instances the specifications for beef carcasses or parts thereof vary among the different Defendant food chains and other co-conspirators.

Packers in various parts of the United

States, including many in the State of Nevada, regularly make available beef carcasses and parts thereof meeting the specifications of the Defendant retail chain stores and other merchandisers of beef. The Defendant chain stores state to these packers, often a week or more in advance of the actual availability of the dressed beef, the quantity and price of the beef upon which Defendants will accept delivery. It is the agreed upon monopsony practice of these Defendant chain stores, who have dominant market power, to offer the packers a price substantially lower than those offered by other merchandisers of beef who do not have such dominant market power.

Various of the Defendant major retail chain stores bid to the packers in

Nevada and elsewhere on different days of the week.

The meat packing business is a volume operation whereby packers minimize costs by maximizing output. Most packers do not have the warehousing facilities to store perishable beef over an extended period of time and must ship their daily carcass production within 24 to 28 hours after slaughter. The dominant retail food chains maintain extensive warehousing facilities and can utilize storage space to take advantage of low prices as a lever to bargain against packers as prices strengthen. Through means and manipulation of The Yellow Sheet published by Defendant National Provisioner, Incorporated, retail food chains keep informed about beef prices, calculate the prices they will pay,

communicate the prices to each other and use the said Yellow Sheet as a tool to purchase beef from the packers at artificially low prices.

3. The price of beef dictated by the retail food chains to the packers directly determines the price which cattle producers such as Plaintiffs realize on the sale of their cattle. The price squeeze on the packers by the Defendant dominant retail food chains results in turn in a lower price to the cattle producers such as the Plaintiffs. The price of calves, steers and fat cattle is depressed as the price of beef is held stable or pushed down by the Defendant retail food chains and other major food chains.

4. During the period of time covered by this Complaint, Defendants

have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce throughout the Western part of the United States, including the State of Utah. Most livestock slaughtering plants are located near the areas of livestock production and feeding. The states of Arizona, Utah, Nevada and California are major areas of livestock production and feeding. Most of the beef production from these states moves across state lines to packers located mainly in the following areas: Phoenix, Arizona; Dallas, Texas; Houston, Texas; Los Angeles, California; San Francisco, California; Seattle, Washington; Southern Idaho; Denver,

Colorado; and Salt Lake City, Utah. The Defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous shipment of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed food.

V

OFFENSES CHARGED

1. Beginning at a date unknown to Plaintiffs, but at least as early as 1963, and continuing up to the date of the filing of this Complaint, the

Defendants and co-conspirators through meetings arranged and conducted by Defendant National Association of Food Chains and by other means have engaged and are now engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed beef, and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2).

2. The aforesaid combination and conspiracy to restrain trade and commerce,

and the combination and conspiracy to monopolize, the monopolization, and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plans, agreements and concerts of action by and among Defendants and their co-conspirators, the substantial terms, purpose and intent of which have been to:

(a) Fix, stabilize and maintain at uniform, noncompetitive and artificially low levels the price paid to slaughterhouses and meat packers for fresh, frozen and processed beef;

(b) Charge noncompetitive and artificially high prices for fresh, frozen and processed beef sold at retail to consumers;

(c) Utilize market dominance and economic power to depress and maintain

at artificially low and constant levels the farm-wholesale price margin or spread when the wholesale-retail price margin or spread is and has been experiencing consistent increases and unexplained, noncost justified, abrupt rises such as occurred to a greater extent in 1969 and 1973 and to a lesser extent over the last 20-year period;

(d) Geographically segment the market for fresh, frozen and processed beef and allocate territories to the dominant retail food chains and to thereby exercise price leadership in the purchase and sale of such beef;

(e) Eliminate price competition for fresh, frozen and processed beef by employing a system of price leadership whereby Safeway on the West Coast

and A & P on the East Coast and other co-conspirators at other times and places set prices by accepting bids from packers one day in advance of all other retail food chains who thereafter follow the price established by the dominant firms;

(f) Eliminate price competition for fresh, frozen and processed beef by employing The Yellow Sheet published by Defendant National Provisioner as a device to communicate the price paid in the different areas of the United States and thereby stabilize prices throughout the United States;

(g) Utilize the National Association of Food Chains to develop and effectuate the aforesaid price fixing conspiracy;

(h) Manipulate The Yellow Sheet information gathering methods so that The Yellow Sheet reflects artificially low and inaccurate prices paid for beef carcasses and parts thereof;

(i) Hold meetings among their own agents and employees and with each other for the purpose of implementing, designing, organizing and carrying out all of the conspiracies alleged herein;

(j) Boycotted packers, feed lots and producers until prices were satisfactory to them;

(k) Purchase large portions of hind quarters, leaving excesses of front quarters and then purchasing the front quarters at substantially decreased prices.

VI

FRAUDULENT CONCEALMENT

1. The Defendants and co-conspirators respectively, fraudulently concealed the existence of their combination and conspiracy by various means used to avoid the detection thereof, including express denials on the public record under oath of meeting together to discuss meat pricing and as a result of such concealment, the Plaintiffs and each of them had no knowledge and could not, by the exercise of reasonable diligence have obtained the knowledge of the existence of the combination and conspiracy until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the Defendant co-conspirators did indeed meet together to

discuss the pricing of beef.

2. By virtue of this fraudulent concealment, Plaintiffs and each of them assert the tolling of the applicable statute or period of limitations affecting Plaintiffs' rights to action hereof.

VII

INJURY TO PLAINTIFFS

1. As a direct and proximate result of the unlawful acts and conduct of Defendants and co-conspirators hereinbefore alleged, Plaintiffs variously have suffered injury to their business and property as follows:

(a) Loss of and reduction in value of their respective businesses;

(b) Loss and decrease in profits which would have otherwise been earned;

(c) Increased expenses per unit of beef produced; decreased production

and profitability which have caused losses and have prevented ordinary business expansion which would otherwise have occurred, thus resulting in additional losses of profits which would otherwise have accrued if such expansion could have occurred.

2. The precise extent of the aforesaid damages are not presently known and Plaintiffs hereby pray leave of court to amend this said amount as has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid

trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2).

2. Plaintiffs, and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States.

3. Plaintiffs, and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. Section 15).

4. Plaintiffs, and each of them, recover the costs of suit, together with attorney's fees as provided by Section 4 of the Clayton Act (15 U.S.C. Section 15).

5. Defendants, and each of them, be permanently enjoined and restrained

from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. Section 26).

6. Plaintiffs be awarded such other and further relief as this Court may deem just and proper.

DATED this 16th day of March, 1976.

/s/
Lowell V. Summerhays

/s/
David M. Swope

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

In Re: BEEF INDUSTRY ANTITRUST LITIGATION	M.D.L. Docket No. 248
This documents relates to: BURKE PETERSEN and YVONNE PETERSEN, individually and dba EUREKA RANCH COMPANY, and PETERSEN CATTLE COMPANY, Plaintiffs, vs. SAFEWAY STORES, INC., a Maryland corporation; GREAT ATLANTIC & PACIFIC TEA CO., a Maryland corporation; THE KROGER CO., an Ohio corporation; AMERICAN STORES CO., formerly ACME MARKETS, a Delaware corporation; LUCKY STORES, INC., a California corporation; WINN-DIXIE STORES, INC., a Florida corporation; FOOD FAIR STORES, INC., a Pennsylvania corporation; GRAND UNION CO.,	Civil Action No. CA 3-76-1254 AMENDED COMPLAINT (Jury Trial Demanded)

a Delaware corporation; SUPERMARKETS GENERAL CORPORATION; a Delware corporation; ALBERTSON'S, INC., a Nevada corporation; ARDEN-MAYFAIR, INC., a Delaware corporation; CIRCLE K CORPORATION, a Texas corporation; SKAGGS COMPANIES, INC., a Delaware corporation; THRIFTI MART, INC., a California corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, an unincorporated association; THE NATIONAL PROVISIONER, a New York corporation; JEWEL COMPANIES, INC., a New York corporation; NATIONAL TEA COMPANY, an Illinois corporation; ALLIED SUPERMARKETS, INC., a Delware corporation, and FIRST NATIONAL STORES, INC., a Massachusetts corporation,

Defendants.

Plaintiffs, by their attorneys, bring this civil action against the above-named Defendants for treble the amount of damages suffered by them by reason of

the Defendants' violations of the anti-trust laws of the United States and, demanding a trial by jury, complain and allege as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the named Defendants for violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §§1 and 2), entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act. Plaintiffs also seek treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

2. Each of the Defendants or their agents maintain offices, transact

business or are found within the Northern District of California and are within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in furtherance of the violations of the antitrust laws, as hereinafter alleged, have been performed within the Northern District of California. The interstate trade and commerce described hereinafter is carried on, in part, within the Northern District of California.

II

PARTIES

Plaintiffs:

1. The Plaintiffs Burke Petersen and Yvonne Petersen, dba Eureka Ranch Company, and Petersen Cattle Company conduct business at the following locations:

(a) At a ranch 18 miles south of Billings, Montana;

(b) At a ranch south of Harden, Montana, which is approximately 65 miles south of Billings, Montana;

(c) Consistently during the four (4) years prior to the filing of this complaint, the Plaintiffs have maintained approximately 4,500 cows, together with assorted bulls which have been used in the production of beef cattle for sale throughout the Mountain West, a large portion of said beef having been ultimately retailed to the public by Defendants;

(d) The Plaintiffs also maintain a large ranch based at Eureka, Nevada which consists of the consolidation of the following ranches: Fish Creek, Cold Creek and Hot Creek, totaling

approximately 1,300,000 acres;

(e) At the Eureka, Nevada ranch, the Plaintiffs maintain approximately 4,500 cows, together with assorted bulls which are used for the production of beef cattle, most of which have been retailed to the public by the Defendants and a portion of which beef cattle are marketed in California and in the Northern District thereof.

Defendants:

2. Safeway Stores, Inc. (hereinafter "Safeway"), a Maryland corporation with its principal place or business located in Oakland, California, is hereby named a Defendant herein. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States with more than 2,400 such stores, the majority of which are located west

of the Mississippi River. Safeway's retail food stores sell meat products, including beef. In support of its retail business, Safeway operates extensive distribution and processing facilities, including meat distribution warehouses and four meat processing plants.

3. Great Atlantic & Pacific Tea Co., Inc., (hereinafter "A & P"), a Maryland corporation with its principal place of business located in Montvale, New Jersey, is hereby named a Defendant herein. A & P operates the second largest chain of retail food stores in the United States with more than 3,400 such stores in 33 states, the majority of which are located east of the Mississippi River. A & P's retail food stores sell meat products, including beef. In support of its retail business,

A & P operates meat distribution warehouses.

4. The Kroger Co. (hereinafter "Kroger"), an Ohio corporation with its principal place of business located in Cincinnati, Ohio, is named a Defendant herein. Kroger operates the third largest chain of retail food stores in the United States, the majority of which are located in the Midwest and Southern areas of the United States. Kroger's retail food stores sell meat products, including beef. In support of its retail business, Kroger processes food, including beef, for sale by the retail stores.

5. American Stores Co., formerly Acme Markets, Inc. (hereinafter "Acme"), Delaware corporation with its principal place of business located in

Wilmington, Delaware, is hereby named a Defendant. Acme and its subsidiaries operate a chain of more than 700 retail food stores in nine states. Acme's retail food stores sell meat products, including beef. In support of its retail business, Acme operates three meat packing plants.

6. Lucky Stores, Inc. (hereinafter "Lucky"), a California corporation with its principal place of business located in Dublin, California, is hereby named a Defendant. Lucky and its subsidiaries operate a chain of more than 200 retail food stores in 28 states which sell meat products, including beef.

7. Jewel Companies, Inc. (hereinafter "Jewel"), a New York corporation with its principal place of business located in Chicago, Illinois, is hereby named

a Defendant. Jewel and its divisions operate a chain of more than 215 retail food stores in the Midwest, New England and northwestern areas of the United States which sell meat products, including beef.

8. Food Fair Stores, Inc. (hereinafter "Food Fair"), a Pennsylvania corporation with its principal place of business located in Philadelphia, Pennsylvania, is hereby named a Defendant. Food Fair and its subsidiaries operate a chain of more than 450 retail food stores along the eastern seaboard area of the United States. Food Fair's retail food stores must sell meat products, including beef. In support of its retail business, Food Fair operates various food manufacturing and processing plants, including one slaughterhouse.

9. Grand Union Co. (hereinafter "Grand Union"), a Delaware corporation with its principal place of business located in Elmwood Park, New Jersey, is hereby named a Defendant. Grand Union and its subsidiaries operate a chain of more than 500 retail food stores in 11 eastern states which must sell meat products, including beef.

10. Supermarkets General Corp. (hereinafter "Supermarkets General"), a Delaware corporation with its principal place of business located in Woodbridge, New Jersey, is hereby named a Defendant. Supermarkets General operates a chain of more than 100 retail food stores under the "Pathmark" name in six northeastern states which sell meat products, including beef.

11. Albertson's, Inc. (hereinafter

Albertson's"), a Nevada corporation, with its principal place of business in Boise, Idaho, is hereby named a Defendant. Albertson's operates more than 300 stores in 17 western states and further participates in a food product joint venture through its wholly-owned subsidiary, Texas-Albertson's, Inc., with Defendant Skaggs Companies, Inc. known as Mountain States Wholesale Company. Albertson's retail food stores sell meat products, including beef, in aid of their retail operations and purchase the same in interstate commerce.

12. Arden-Mayfair, Inc. (hereinafter "Mayfair"), a Delaware corporation with its principal place of business in Los Angeles, California, is hereby named a Defendant. Mayfair operates more than

183 retail food stores in the Western United States and these stores must sell meat products, including beef, in support of its retail operations and it purchases the same in interstate commerce.

13. Circle K Corporation (hereinafter "CKP"), a Texas corporation with its principal place of business in Phoenix, Arizona, is hereby named a Defendant. CKP operates over 1,000 retail food stores in the Western United States and these stores sell meat products, including beef, in aid of their retail store operations and purchase the same in interstate commerce.

14. Skaggs Companies, Inc. (hereinafter "Skaggs"), a Delaware corporation with its principal place of business in South Salt Lake City, Utah, is hereby named a Defendant. Skaggs operates a

chain of retail self-service drug stores in the Midwestern and Intermountain areas of the United States. Skaggs retail food stores sell meat products, including beef. Skaggs further participates in a joint venture through its wholly owned subsidiary Texas-Skaggs, Inc. with Defendant Albertson's, Inc. which operates grocery-drug supermarkets in Texas, Oklahoma, Florida, Louisiana and Arkansas.

15. Thriftimart, Inc. (hereinafter "Thriftimart"), a California corporation with its principal place of business in Los Angeles, California, is hereby named a Defendant. Thriftimart operates more than 60 retail supermarkets in Southern California and Nevada which sell meat products, including beef. Thriftimart also operates a meat storage

and distribution plant.

16. National Association of Food Chains (hereinafter "NAFC"), located in Washington, D.C., is hereby named a Defendant. NAFC is an unincorporated trade organization whose members are the largest retail food chains in the United States; small food companies and independents are not eligible for membership. The retail food chains which comprise the membership of NAFC are the largest purchasers of carcass beef in the United States.

17. National Provisioner, Inc. (hereinafter "National Provisioner"), located in Chicago, Illinois, is hereby named a Defendant. National Provisioner, a New York corporation, published market advisory services, including the "Yellow Sheet", a publication listing the prices

of beef during the various time periods.

18. National Tea Company (hereinafter "National Tea"), an Illinois corporation, has its principal place of business at 1000 North Crosby Street, Chicago, Illinois and is a member of the National Association of Food Chains and, as a retail grocer throughout the country, acquires meat for its retail outlets.

19. Allied Supermarkets, Inc. (hereinafter "Allied"), a Delaware corporation, has its principal place of business at 8711 Meadowdale, Detroit, Michigan and is a member of the National Association of Food Chains and, as a retail grocer throughout the country, acquires meat for its retail outlets.

20. First National Stores, Inc. (hereinafter "First National"), is a

Massachusetts corporation with its principal place of business at 5 Middlesex Avenue, Somerville, Massachusetts, and is a member of the National Association of Food Chains and, as a retail grocer, acquires meat for its retail outlets from throughout the Western United States.

21. Various other companies, firms, associations and individuals not now made defendants in this amended complaint participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof.

III

NATURE OF TRADE AND COMMERCE

1. Cattle are raised on farms and ranches, such as those owned and operated by Plaintiffs herein. Commercial cow-

calf ranching operations produce the calves and steers which are fattened, slaughtered, processed and later sold by retail food stores to consumers in the form of fresh, frozen or processed beef products. The cow-calf producers sell their cattle either to feedlots where the calves and steers are fattened for slaughter, or directly to slaughter-houses and meat packers. The feedlot operators take calves or yearlings and feed them a concentrate ration for fast growth and fattening until they are ready for slaughter as fat cattle. These cattle are then sold at weights on the average of 900 to 1,000 pounds to meat packers for slaughter. The commercial slaughter-houses or meat packers slaughter the cattle and process the beef carcasses for sale to retail food stores.

2. Many retail food chains, including the Defendant food chains named herein and other co-conspirators, engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof from one or more central locations. Specifications are established by the Defendant retail food chains and other co-conspirators for the beef they buy.

In most instances, the specifications for beef carcasses or parts thereof vary among the different Defendant food chains and other co-conspirators.

Packers in various parts of the United States, including many in the State of Nevada, regularly make available beef carcasses and parts thereof meeting the specifications of the Defendant retail chain stores and other merchandisers

of beef. The Defendant chain stores state to these packers, often a week or more in advance of the actual availability of the dressed beef, the quantity and price of the beef upon which Defendants will accept delivery. It is an agreed-upon monopsony practice of these Defendant chain stores who have dominant market power to offer the packers a price substantially lower than those offered by other merchandisers of beef who do not have such dominant market power.

Various of the Defendant major retail chain stores bid to the packers in Nevada, Montana and elsewhere on different days of the week.

The meat packing business is a volume operation whereby packers minimize costs by maximizing output. Most packers do

not have the warehousing facilities to store perishable beef over an extended period of time and must ship their daily carcass production within 24 to 28 hours after slaughter. The dominant retail food chains maintain extensive warehousing facilities and can utilize storage space to take advantage of low prices as a lever to bargain against packers as prices strengthen. Through means and manipulation of the Yellow Sheet, published by the Defendant National Provisioner, retail food chains keep informed about beef prices, calculate the prices they will pay, communicate the prices to each other and use said Yellow Sheet as a tool to purchase beef from the packers at artificially low prices.

3. The price of beef dictated by

the retail food chains to the packers directly determines the price which cattle producers, such as Plaintiffs, realize on the sale of their cattle. The price squeeze on the packers by the Defendant dominant retail food chains results, in turn, in a lower price to the cattle producers such as the Plaintiffs. The price of calves, steers and fat cattle is depressed as the price of beef is held stable or pushed down by the Defendant retail food chains and other major food chains.

4. During the period of time covered by this complaint, Defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate

commerce from calf and steer-producing states from and into Nevada and from and into other surrounding states. Most livestock slaughtering plants are located near the areas of livestock production and feeding. Northern Nevada and Montana are major areas of livestock production and feeding. Most of the beef production from Northern Nevada and Montana moves across state lines to packers located mainly in the following six areas: Los Angeles, California; San Francisco, California; Seattle, Washington; Southern Idaho; Denver, Colorado and Salt Lake City, Utah. The Defendant retail food chains and other distribute the processed beef in interstate to their various store locations throughout the United States. There is a continuous shipment of cattle and

fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed food.

IV

OFFENSES CHARGED

1. Beginning at a date unknown to Plaintiffs, but at least as early as 1963 and continuing up to the date of the filing of this amended complaint, the Defendants and co-conspirators, through meetings arranged and conducted by the Defendant National Association of Food Chains, and by other means, have engaged and are now engaged in an unlawful combination and conspiracy in

unreasonable restraint of the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed beef, and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize both unilaterally and jointly such trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2).

2. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize, the monopolization and attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plans, agreements and concerts of action by and among Defendants and their co-conspirators, the substantial terms, purpose and intent

of which have been to:

(a) Fix, stabilize and maintain at uniform, noncompetitive and artificially low levels the price paid to slaughterhouses and meat packers for fresh, frozen and processed beef;

(b) Charge noncompetitive and artificially high prices for fresh, frozen and processed beef sold at retail to consumers which had the effect of reducing beef consumption. Said reduction in beef consumption caused Plaintiffs to "hold over" their cattle and not send them to slaughter and increased the unit costs of production and, in addition, several of the Plaintiffs who own and operated feedlots suffered the loss of cattle because they were unable to sell the cattle in feedlots and said cattle died. In

addition, because of the reduction in consumption, packers and slaughterhouses were reduced in number; thus, creating fewer outlets for the Plaintiffs to sell their cattle. This has created in the cattlemen's area of the economy a breakdown of competitive conditions which has endangered the economy and has damaged Plaintiffs. The effect of the Defendants' actions in maintaining noncompetitive and artificially high prices could reasonably be foreseen to affect the Plaintiffs and the area of the economy in which they operate;

(c) Utilize market dominance and economic power to depress and maintain at artificially low and constant levels the farm-wholesale price margin or spread when the wholesale-retail price margin or spread is and has been experiencing

consistent increases and unexplained, non-cost justified, abrupt rises, such as occurred to a greater extent in 1969 and 1973 and to a lesser extent over the last 20-year period;

(d) Geographically segment the market for fresh, frozen and processed beef and allocate territories to the dominant retail food chains and to thereby exercise price leadership in the purchase and sale of such beef. Said allocation of territories and geographical segments of the market could reasonably be foreseen to affect the Plaintiffs and the area of the economy in which they operate. These acts reduced the outlets and forced the concentration of the markets in which the Plaintiffs sold their cattle;

(e) Eliminate price competition for fresh, frozen and processed beef by

employing a system of price leadership whereby Safeway on the West Coast and A & P on the East Coast and other co-conspirators, at other times and places, set prices by accepting bids from packers one day in advance of all other retail food chains who thereafter follow the price established by the dominant firms;

(f) Eliminate price competition for fresh, frozen and processed beef by employing the Yellow Sheet published by Defendant National Provisioner as a device to communicate the price paid in the different areas of the United States and thereby stabilize prices throughout the United States;

(g) Utilize the National Association of Food Chains to develop and effectuate the aforesaid price-fixing conspiracy;

(h) Manipulate the Yellow Sheet information gathering methods so that the Yellow Sheet reflects artificially low and inaccurate prices paid for beef carcasses and parts thereof;

(i) Hold meetings among their own agents and employees and with each other for the purpose of implementing, designing, organizing and carrying out all of the conspiracies alleged herein;

(j) Boycotted packers, feedlots and producers until prices were satisfactory to them;

(k) Purchase large portions of hind quarters, leaving excesses of front quarters and then purchasing the front quarters at substantially decreased prices.

V

FRAUDULENT CONCEALMENT

1. The Defendants and co-conspirators, respectively, fraudulently concealed the existence of their combination and conspiracy by various means used to avoid the detection thereof, including express denials on the public records under oath of meeting together to discuss meat pricing and, as a result of such concealment, the Plaintiffs, and each of them, had no knowledge and could not, by the exercise of reasonable diligence, have obtained the knowledge of the existence of the combination and conspiracy until July 17, 1974 when it was disclosed at a trial in the United States District Court for the Northern District of California that the Defendant co-conspirators did, indeed, meet together to discuss the pricing of beef.

2. By virtue of this fraudulent concealment, Plaintiffs, and each of them, assert the tolling of the applicable statute or period of limitations affecting Plaintiffs' rights to action hereof.

VI

INJURY TO PLAINTIFFS

1. As a direct and proximate result of the unlawful acts and conduct of Defendants and co-conspirators hereinbefore alleged, Plaintiffs variously have suffered injury to their business and property as follows:

(a) Loss of and reduction in value of their respective businesses;

(b) Loss and decrease in profits which would have otherwise been earned;

(c) Increased expenses per unit of beef produced; decreased production and

profitability which have caused losses and have prevented ordinary business expansion which would otherwise have occurred, thus resulting in additional losses of profits which would otherwise have accrued if such expansion could have occurred.

2. The price extent of the aforesaid damages are not presently known and Plaintiffs hereby pray leave of Court to amend this said amount as has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce, as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the

aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2).

2. Plaintiffs, and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States.

3. Plaintiffs, and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. §15).

4. Plaintiffs, and each of them, recover the costs of suit, together with attorney's fees, as provided by Section 4 of the Clayton Act (15 U.S.C. §15).

5. Defendants, and each of them, be permanently enjoined and restrained

from each and every unlawful practice alleged herein, as provided by Section 16 of the Clayton Act (15 U.S.C. §26).

6. Plaintiffs be awarded such other and further relief as to this Court seems just and proper.

DATED this 29 day of June, 1977.

SUMMERHAYS & SWOPE

By_____
Lowell V. Summerhays

By_____
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN O. VARIAN and ZERA L. VARIAN, his wife, Plaintiffs, -vs- SAFEWAY STORES, INC., a Maryland corporation; GREAT ATLANTIC & PACIFIC TEA CO., a Maryland corporation; THE KROGER CO., an Ohio corporation; AMERICAN STORES CO., formerly ACME MARKETS, a Deleware corporation;	NO: 76 3073 COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTI-TRUST LAWS

LUCKY STORES, INC., a)
California corporation;)
WINN-DIXIE STORES, INC., a)
Florida corporation; FOOD)
FAIR STORES, INC., a)
Pennsylvania corporation;)
GRAND UNION CO., a)
Delaware corporation;)
SUPERMARKETS GENERAL)
CORPORATION, a Delaware)
corporation; ALBERTSON'S)
INC., a Nevada corporation;)
ARDEN-MAYFAIR, INC., a)
Delaware corporation;)
CIRCLE K CORPORATION, a)
Texas corporation; THRIFTI)
MART, INC., a California)
corporation; NATIONAL)
ASSOCIATION OF FOOD CHAINS,)
an unincorporated associa-)
tion; THE NATIONAL)
PROVISIONER, a New York)
corporation; JEWEL)
COMPANIES, INC., a New)
York corporation; NATIONAL)
TEA COMPANY, an Illinois)
corporation; STOP & SHOP,)
INC., a Massachusetts)
corporation; ALLIED SUPER-)
MARKETS, INC., a Delaware)
corporation; FIRST)
NATIONAL STORES, INC., a)
Massachusetts corporation;)
COLONIAL STORES, INC. a)
Virginia corporation;)
PUEBLO INTERNATIONAL, INC.,)
a Delaware corporation;)
VON'S GROCERY CO., a)
Delaware corporation,)
)
Defendants.)

Plaintiffs, by their attorneys, bring this civil action against the above-named Defendants for treble the amount of damages suffered by them by reason of the Defendants' violations of the antitrust laws of the United States, and demanding a trial by jury, complain and allege as follows:

I

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named Defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1980, as amended, (15 U.S.C., §§ 1 and 2), entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act. Plaintiffs also seek treble damages and injunctive relief under §§ 4

and 16 of the Clayton Act (15 U.S.C., 15 and 26.)

2. Each of the Defendants or its agents maintains offices, transacts business, or is found within the State of California and is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in furtherance of violations of the antitrust laws as hereinafter alleged have been performed within the State of California. The interstate trade and commerce described hereinafter is carried on in part within the State of California.

II

RELATED CASES

1. The following related cases have been filed throughout the United States: Burke Petersen, et al., v. Safeway Stores,

et al., C-75-0984 RFP; James F. Boccardo, et al., v. Safeway, et al., C-76-600 OJC; Pony Creek Cattle Company, et al., v. The Great Atlantic & Pacific Tea Company, et al., CA3-75-0702-C; A.L. Black, et al., v. Acme Markets, Inc., et al., CA2-75-186; Richard S. Lowe v. Safeway Stores, Inc., et al., C-75-4043; Meat Price Investigators Association, et al., v. Safeway Stores, et al., CA-75-333-2; R. Dirk Agee, et al., v. Safeway et al., R-75-224-BRT; and Chaparral Cattle Corp., et al., v. Safeway Stores, Inc., et al., C-76-79.

The foregoing actions have been consolidated by an order of the Judicial Panel on Multidistrict Litigation entered September 2, 1976, which provided, among other things, as follows:

> "IT IS THEREFORE ORDERED that the actions listed on the following Schedule A and pending in districts other than the Northern District of Texas be, and the same hereby are, transferred to the Northern District of Texas and, with the consent of that court, assigned to the Honorable William M. Taylor, Jr., for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C., Section 1407 with the actions pending there and listed on Schedule A."

Not specifically named in the Order but also related are the following cases which have recently been filed: Ronald Becker, et al., on behalf of themselves and all other persons similarly situated, V. Safeway Stores, Inc., et al., 76-251-1, filed August 10, 1976, in the United States District Court for the Southern District of Iowa, Central Division; and Meat Price Investigators Association, et al., v. Iowa Beef Processors, Inc., et al., 76-252-2, filed August 10, 1976 in

the United States District Court for the Southern District of Iowa, Central Division.

2. The instant Varian pleading, the subject matter of this action, should be immediately ordered to be consolidated and removed to the Northern District of Texas under the terms of the Order of Consolidation and pursuant to 28 U.S.C. and Rules 1 and 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

III

PARTIES

A. DEFENDANTS.

1. SAFEWAY STORES, INC. (hereinafter "Safeway"), a Maryland corporation with its principal place of business located in Oakland, California, is hereby named a Defendant herein. Safeway and its

subsidiaries operate the largest chain or retail food stores in the United States with more than 2,400 such stores, the majority of which are located west of the Mississippi River. Safeway's retail food stores sell meat products, including beef. In support of its retail business, Safeway operates extensive distribution and processing facilities including meat distribution warehouses and four meat processing plants. The Defendant Safeway has a large concentration of meat purchasing and retail sales facilities in the Los Angeles metropolitan area.

2. GREAT ATLANTIC & PACIFIC TEA CO., INC. (hereinafter "A & P"), a Maryland corporation with its principal place of business located in Montvale, New Jersey, is hereby named a Defendant herein. A &

P operates the second largest chain of retail food stores in the United States with more than 3,400 such stores in 33 states, the majority of which are located east of the Mississippi River. A & P's retail food stores sell meat products, including beef. In support of its retail business, A & P operates meat distribution warehouses. A & P does business throughout the State of California.

3. THE KROGER CO. (hereinafter "Kroger"), an Ohio corporation with its principal place of business in Cincinnati, Ohio, is named a Defendant. Kroger operates the third largest chain of retail food stores in the United States, the majority of which are located in the midwest and southern areas of the United States. Kroger's retail food stores sell

meat products, including beef. In support of its retail business, Kroger processes food, including beef, for sale by the retail stores. The Market Basket was a chain of retail grocery stores which bought and sold substantial quantities of beef in interstate commerce which was previously operated as a subsidiary of The Kroger Company. Most of its stores were located within the State of California. The Market Basket merged into The Kroger Company in 1973 and pursuant to the terms of the merger and applicable law governing said merger, Kroger has become liable for the wrongful acts of The Market Basket which The Market Basket has committed during the relevant period in violation of the antitrust laws in the meat industry.

4. AMERICAN STORES CO., formerly ACME

MARKETS, INC. (hereinafter "Acme"), a Delaware corporation with its principal place of business located in Wilmington, Delaware, is hereby named a Defendant. Acme and its subsidiaries operate a chain of more than 700 retail food stores in 9 states. Acme's retail food stores sell meat products, including beef. In support of its retail business, Acme operates three meat packing plants.

5. LUCKY STORES, INC. (hereinafter "Lucky"), a California corporation with its principal place of business located in Dublin, California, is hereby named a Defendant. Lucky and its subsidiaries operate a chain of more than 200 retail food stores in 28 states which sell meat products, including beef.

6. JEWEL COMPANIES, INC. (hereinafter "Jewel"), a New York corporation with its

principal place of business located in Chicago, Illinois, is hereby named a Defendant. Jewel and its divisions operate a chain of more than 215 retail food stores in the Midwest, New England and northwestern areas of the United States which sell meat products including beef.

7. WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie"), is a Florida corporation with its principal place of business located in Jacksonville, Florida, and is hereby named a Defendant. Winn-Dixie and its divisions operate a chain of more than 970 retail food stores in the southeastern United States and is the eighth largest chain of retail food stores in the United States. In support of its retail business, Winn-Dixie operates various food manufacturing and

processing plants and purchases meat products in interstate commerce.

8. FOOD FAIR STORES, INC. (hereinafter "Food Fair"), a Pennsylvania corporation with its principal place of business located in Philadelphia, Pennsylvania, is hereby named a Defendant. Food Fair and its subsidiaries operate a chain of more than 450 retail food stores along the eastern seaboard area of the United States. Food Fair's retail food stores must sell meat products, including beef. In support of its retail business, Food Fair operates various food manufacturing and processing plants, including one slaughterhouse.

9. GRAND UNION OIL CO. (hereinafter "Grand Union"), a Delaware corporation with its principal place of business located in Elmwood Park, New Jersey, is

hereby named a Defendant. Grand Union and its subsidiaries operate a chain of more than 500 retail food stores in 11 eastern states which must sell meat products, including beef.

10. SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General"), a Delaware corporation with its principal place of business located in Woodbridge, New Jersey, is hereby named a Defendant. Supermarkets General operates a chain of more than 100 retail food stores under the "Pathmark" name in six northeastern states which sell meat products, including beef.

11. ALBERTSON'S, INC. (hereinafter "Albertson's"), a Nevada corporation with its principal place of business in Boise, Idaho, is hereby named a Defendant. Albertson's operates more than 300 stores

in 17 western states and further participates in a food product joint venture through its wholly owned subsidiary, Texas-Albertson's, Inc., with Skaggs Companies, Inc., known as Mountain States Wholesale Company. Albertson's retail food stores sell meat products, including beef, in aid of their retail operations and purchase the same in interstate commerce.

12. ARDEN-MAYFAIR, INC. (hereinafter "Mayfair"), a Delaware coproration with its principal place of business in Los Angeles, California, is hereby named a Defendant. Mayfair operates more than 183 retail food stores in the Western United States and these stores sell meat products including beef, in support of its retail operations and it purchases same in interstate commerce.

13. CIRCLE K CORPORATION (hereinafter "CKP"), a Texas corporation with its principal place of business in Phoenix, Arizona, is hereby named a Defendant. CKP operates over 1,000 retail food stores in the western United States and these stores sell meat products, including beef, in aid of their retail store operations and purchase the same in interstate commerce.

14. THRIFTIMART, INC. (hereinafter "Thriftimart"), a California corporation with its principal place of business in Los Angeles, California, is hereby named a Defendant. Thriftimart operates more than 60 retail supermarkets in Southern California and Nevada which sell meat products, including beef. Thriftimart also operates a meat storage and distribution plant.

15. NATIONAL ASSOCIATION OF FOOD

CHAINS (hereinafter "NAFC"), located in Washington, D.C. is hereby named a Defendant. NAFC is an unincorporated trade orgainzation whose members are the largest retail food chains in the United States; small food companies and independents are not eligible for membership. The retail food chains that comprise the membership of NAFC are the largest purchasers of carcass beef in the United States. The NAFC has conducted many of its meetings in the State of California at which it, together with various of its members, have conspired to fix retail and wholesale meat prices.

16. NATIONAL PROVISIONER, INC. (hereinafter "National Provisioner"), located in Chicago, Illinois, is hereby named a Defendant. National Provisioner, a New York corporation, published market

advisory services including "The Yellow Sheet", a publication listing the prices of beef during the various time periods.

17. The Defendant JEWEL COMPANIES, INC., a New York corporation with its principal place of business located in Chicago, Illinois, operates a chain of more than 375 retail food stores in the Midwest, New England and the Northwest areas of the United States which sell meat products, including beef.

18. The Defendant NATIONAL TEA COMPANY, an Illinois corporation with its principal place of business at 1000 North Crosby Street, Chicago, Illinois, is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets.

19. The Defendant STOP & SHOP, INC.

a Massachusetts corporation with its principal place of business at 393 D Street, Boston, Massachusetts, is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets.

20. The Defendant ALLIED SUPER-MARKETS, INC., a Delaware corporation with its principal place of business at 8711 Meadowdale, Detroit, Michigan, is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets.

21. The Defendant FIRST NATIONAL STORES, INC., a Massachusetts corporation with its principal place of business at 5 Middlesex Avenue, Somerville, Massachusetts, is a member of the National

Association of Food Chains, and as a retail grocer, acquires meat for its retail outlets from throughout the Western United States.

22. The Defendant COLONIAL STORES, INC., a Virginia corporation with its principal place of business at 2251 North Sylvan Road, Atlanta, Georgia, is a member of the National Association of Food Chains, and as a retail grocer throughout the country, acquires meat for its retail outlets.

23. The Defendant PUEBLO INTERNATIONAL, INC., a Delaware corporation having its principal place of business at 375 Park Avenue, New York, New York 10017, is a member of the National Association of Food Chains, and as a retail grocer throughout the country, acquires meat for its retail outlets.

24. The Defendant VON'S GROCERY CO., a Delaware corporation, is a large retail meat chain with a majority of its stores located in the State of California which has, from time to time, conspired with the remaining Defendants for the purposes of fixing the prices of meat at the retail and wholesale levels within the State of California.

25. Various other companies, firms, associations and individuals not now made Defendants in this Complaint participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof.

B. PLAINTIFFS.

26. The Plaintiff JOHN O. VARIAN owns and operates a ranch located near Parkfield, California, upon which he runs steers, most of which are purchased from

from third parties. This ranch has been in operation by him since approximately 1961. John O. Varian also operates another ranch located near San Luis Obispo, California, which is also a steer operation. The plaintiffs conduct business near Bakersfield, California, and operate a commercial feedlot. John O. Varian has also personally conducted cattle feeding operations from time to time in commercial feedlots. John O. Varian leases various ranches upon which he conducts beef-producing operations of various descriptions.

IV

NATURE OF TRADE AND COMMERCE

1. Cattle are raised on farms and ranches such as those owned and operated by Plaintiffs herein. Commercial cow-calf ranching operations produce the

calves and steers which are fattened, slaughtered, processed and later sold by retail food stores to consumers in the form of fresh, frozen or processed beef products. The cow-calf producers sell their cattle either to feedlots where the calves and steers are fattened for slaughter, or directly to slaughterhouses and meat packers. The feedlot operators take calves or yearlings and feed them a concentrate ration for fast growth and fattening until they are ready for slaughter as fat cattle. These cattle are then sold at weights on the average of 900 to 1,100 pounds to meat packers for slaughter. The commercial slaughterhouses or meat packers slaughter the cattle and process the beef carcasses for sale to retail food stores.

2. Many retail food chains, including

the Defendant food chains named herein and other co-consparators engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof from one or more contral locations. Specifications are established by the Defendant retail food chains and other co-conspirators for the beef they buy.

In most instances, the specifications for beef carcasses or parts thereof vary among the different Defendant food chains and other co-conspirators.

Packers in various parts of the United States, including many in the State of California, regularly make available beef carcasses and parts thereof meeting the specifications of the Defendant retail chain stores and other merchandisers of beef. The Defendant chain stores state to

these packers, often a week or more in advance of the actual availability of the dressed beef, the quantity and price of the beef upon which Defendants will accept delivery. It is agreed-upon monopsony practice of these Defendant chain stores who have dominant market power to offer the packers a price substantially lower than those offered by other merchandisers of beef who do not have such dominant market power.

Various of the Defendant major retail chain stores bid to the packers in California and elsewhere on different days of the week.

The meat packing business is a volume operation whereby packers minimize costs by maximizing output. Most packers do not have the warehousing facilities to store perishable beef over an extended

period of time and must ship their daily carcass production within 24 to 28 hours after slaughter. The dominant retail food chains maintain extensive warehousing facilities and can utilize storage space to take advantage of low prices as a lever to bargain against packers as prices strengthen. Through means and manipulation of The Yellow Sheet published by Defendant National Provisioner, retail food chains keep informed about beef prices, calculate the prices they will pay, communicate the prices to each other and use said The Yellow Sheet as a tool to purchase beef from the packers at artifically low prices.

3. The price of beef dictated by the retail food chains to the packers directly determines the price which cattle producers such as Plaintiffs realize on

the sale of their cattle. The price squeeze on the packers by the Defendant doninant retail food chains results in turn in a lower price to the cattle producers such as the Plaintiffs. The price of calves, steers and fat cattle is depressed as the price of beef is held stable or pushed down by the Defendant retail food chains and other major food chains.

4. During the period of time covered by this Complaint, Defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf and steer producing states from and into California and from and into other surrounding states. Most livestock

slaughtering plants are located near large metropolitan areas to which livestock are moved for slaughter. Some slaughtering plants are distributed throughout livestock producing areas. Southern California is a major area of livestock production and feeding and much of the livestock production of Southern California is consumed there. But a substantial portion of such production is exported from the State of California for consumers in other states. The Defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous shipment of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the

antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interestate trade and commerce in cattle and fresh, frozen and processed food.

V

OFFENSES CHARGED

1. Beginning at a date unknown to Plaintiffs, but at least s early as 1963 and continuing up to the date of the filing of this Complaint, the Defendants and co-conspirators, through meetings arranged and conducted by the Defendant National Association of Food Chains and by other means, have engaged and are now engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed beef and have engaged and are

now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize both unilaterally and jointly such trade and commerce in violation of 1 and 2 of the Sherman Act (15 U.S.C., 1 and 2).

2. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize, the monopolization and the attempt to monopolize such trade and commerce, have consisted of a continuing course of conduct, plans, agreements and concerts of action by and among Defendants and their co-conspirators, the substantial terms, purpose and intent of which have been to:

(a) Fix, stabilize and maintain at uniform, noncompetitive and artifically low levels the price

paid to slaughterhouses and meat packers for fresh, frozen and processed beef;

(b) Charge noncompetitive and artificially high prices for fresh, frozen and processed beef sold at retail to consumers which had the effect of reducing beef consumption. Said reduction in beef consumption caused Plaintiffs to "hold over" their cattle and not send them to slaughter and increased the unit costs of production, and, in addition, several of the Plaintiffs who own and operated feedlots suffered the loss of cattle because they were unable to sell the cattle in feedlots and said cattle died. In addition, because of the reduction in con-

sumption, packers and slaughter-houses were reduced in number, thus creating fewer outlets for the Plaintiffs to sell their cattle. This has created in cattle-men's area of the economy a break-down of competitive conditions which has endangered the economy and has damaged Plaintiffs. The effect of the Defendants' action in maintaining noncompetitive and artificially high prices could reasonably be foreseen to affect the Plaintiffs and the area of the economy in which they operate;

(c) Utilize market dominance and economic power to depress and maintain at artificially low and constant levels the farm-wholesale price margin or spread

when the wholesale-retail price margin or spread is and has been experiencing consistent increases and unexplained, noncost justified, abrupt rises such as occurred to a greater extent in 1969 and 1973 and to a lesser extent over the last 20 year period;

(d) Geographically segment the market for fresh, frozen and processed beef and allocate territories to the dominant retail food chains and to thereby exercise price leadership in the purchase and sale of such beef, said allocation of territories and geographical segments of the market could reasonably be foreseen to affect the Plaintiffs and the area of the economy in which they operate.

These acts reduced the outlets and forced the concentration of the markets in which the Plaintiffs sold their cattle;

(e) Eliminate price competition for fresh, frozen and processed beef by employing a system of price leadership whereby Safeway on the West Coast and A & P on the East Coast and other co-conspirators at other times and places set prices by accepting bids from packers one day in advance of all other retail food chains who thereafter follow the price established by the dominant firms;

(f) Eliminate price competition for fresh, frozen and processed beef by employing The Yellow Sheet published by Defendant National

Provisioner as a device to communicate the price paid in the different areas of the United States and thereby stabilizes prices throughout the United States;

(g) Utilize the National Association of Food Chains to develop and effectuate the aforesaid price-fixing conspiracy;

(h) Manipulate The Yellow Sheet information gathering methods so that The Yellow Sheet reflects artificially low and inaccurate prices paid for beef carcasses and parts thereof;

(i) Hold meetings among their own agents and employees and with each other for the purpose of implementing, designing, organizing and carrying out all of

the conspiracies alleged herein;

(j) Boycotted packers, feedlots and producers until prices were satisfactory to them;

(k) Purchase large portions of hind quarters, leaving excesses of front quarters and then purchasing the front quarters at substantially decreased prices.

3. The Defendants have generally agreed to fix the retail price of beef throughout the country. Most, if not all, of the Defendants have formulas of operation whereby they relate the wholesale price which they will pay for meat to the packers in direct relationship to the retail price which they charge in the stores for sale to the public in order to guaranty a fixed percentage of profit on their retail operations. Because the

packers cannot hold their slaughtered beef for any substantial period of time, they are forced, in most instances, to sell to the Defendant retail markets at prices which the Defendant retail markets are willing to pay and which the Defendant retail markets fix in advance. The packers are therefore only able to take a small operating margin on their sales and force back the price paid to them by the retail chains to the Plaintiff cattle producers and other cattle producers, less a small margin for operating expenses and profit. The retail prices fixed by the Plaintiffs have, in many cases, been excessive, and have created a cross-elasticity of demand whereby the consuming public has, in many instances, and particularly during the year 1973, 1974 and 1975, decreased its consumption

of beef in favor of beef substitutes, namely in the form of cheese and other dairy products, beans and high protein grains. This decrease in demand has substantially adversely affected the volume of the Plaintiffs' sales, decreased his economies of production in view of inventories on hand which had to be held over or liquidated at a loss and thereby substantially damaging the Plaintiffs.

VI

FRAUDULENT CONCEALMENT

1. The Defendants and co-conspirators respectively fraudulently concealed the existence of their combination and conspiracy by various means used to avoid the detection thereof, including express denials on the public records under oath of meeting together to discuss meat pricing and, as a result of such conceal-

ment, the Plaintiffs, and each of them, had no knowledge and could not, by the exercise of reasonable diligence, have obtained the knowledge of the existence of the combination and conspiracy until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the Defendant co-conspirators did indeed meet together to discuss the pricing of beef.

2. By virtue of this fraudulent concealment, Plaintiffs, and each of them, assert the tolling of the applicable statute or period of limitations affecting Plaintiffs' rights to action hereof.

VII

INJURY TO PLAINTIFFS

1. As a direct and proximate result

of the unlawful acts and conduct of Defendants and co-conspirators hereinbefore alleged, Plaintiffs variously have suffered injury to their business and property as follows:

(a) Loss of and reduction in value of their respective businesses;

(b) Loss and decrease in profits which would have otherwise been earned;

(c) Increased expenses per unit of beef produced; decreased production and profitability which have caused losses and have prevented ordinary business expansion which would otherwise have occurred, thus resulting in additional losses of profits which would otherwise have accrued if such expansion could have occurred.

2. The price extent of the aforesaid damages are not presently known and Plaintiffs hereby pray leave of court to amend this said amount as has been ascertained.

VIII

CONSUMER RETAIL PRICE-FIXING CLAIM

1. The Plaintiffs are themselves substantial consumers of beef at the retail level and have been damaged because of the price fixing at the retail level and seek recovery for these losses.

WHEREFORE, Plaintiffs pray that this Court, in conjunction with the Plaintiffs' wholesale meat producing operations, adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described and have combined

and conspired to monopolize, have monopolized and attempted to monopolize, the aforesaid trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

2. Plaintiffs, and each of them, have been injured as a direct and proximate results of the aforesaid violations of the antitrust laws of the United States.

3. Plaintiffs, and each of them, recover their actual damages which must be trebled in accordance with the provisions of § 4 of the Clayton Act (15 U.S.C., §§ 15.)

4. Plaintiffs, and each of them, recover the costs of suit, together with attorney's fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15).

5. Defendants, and each of them, be

permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by § 16 of the Clayton Act (15 U.S.C. § 26).

6. Plaintiffs be awarded such other and further relief as this Court may deem just and proper.

DATED this 17th day of September, 1976.

SUMMERHAYS & SWOPE

By_____
Lowell V. Summerhays

SLUTES, BROWNING, ZLAKET & SAKRISON

By_____
William D. Browning

BOOTH, MITCHEL, STRANGE & SMITH

By_____
E. Gary Smith

FILED
JUL 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1920

In re Beef Industry Antitrust Litigation,
M.D.L. Docket No. 248

SAFEWAY STORES, INC., ET AL,
Petitioners,

versus

MEAT PRICE INVESTIGATORS ASSOCIATION, ET AL,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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The following cases were consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation as *In re Beef Industry Antitrust Litigation* (Supermarkets) and transferred to the Honorable William M. Taylor, Jr., Judge of the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. §1407, and they were consolidated for the purposes of appeal to the United States Court of Appeals for the Fifth Circuit:

PONY CREEK CATTLE CO., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., et al.,
Plaintiffs-Intervenors-Appellants,

versus

THE GREAT ATLANTIC & PACIFIC TEA CO., et al.,
Defendants-Appellees.

No. CA 3-75-0702-C (N.D. Tex. June 5, 1975)

R. DIRK AGEE, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1237-C (N.D. Tex. September 7, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1238-C (N.D. Tex. September 7, 1976)

RICHARD S. LOWE, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1244-C (N.D. Tex. September 7, 1976)

A. I. BLACK, et al.,
Plaintiffs-Appellants,

versus

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1248-C (N.D. Tex. September 7, 1976)

CHAPPARAL CATTLE CORP., et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1253-C (N.D. Tex. September 7, 1976)

BURKE PETERSEN, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1254-C (N.D. Tex. September 7, 1976)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1361 (N.D. Tex. September 7, 1976)

JOHN O. VARIAN, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1470-C (N.D. Tex. November 8, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0361 (N.D. Tex. March 16, 1977)

LITTLE RANCH CO., et al.,
Plaintiffs-Appellants,

versus

THE NATIONAL ASSOCIATION OF FOOD CHAINS, et al.,
Defendants-Appellees.

No. CA 3-77-0362-C (N.D. Tex. March 16, 1977)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

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IN THE
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ASSOCIATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

The undersigned Plaintiffs-Respondents respectfully request this Court to deny this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit as filed by Peti-

tioners, Safeway Stores, Inc., et al. and grant only Respondents', A. L. Black, et al., Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 79-2060.

QUESTIONS PRESENTED

I. IS THE "PASS-ON" THEORY APPROPRIATE ONLY TO PRICE-FIXING AS ESPOUSED BY THIS COURT IN *HANOVER SHOE* AND *ILLINOIS BRICK* INAPPOSITE TO PLAINTIFFS'-RESPONDENTS' SITUATION ALLEGING UNLAWFUL MONOPSONISTIC AND OLIGOPSONISTIC PRACTICES OF THE BEEF INDUSTRY BY DEFENDANTS-PETITIONERS.

II. IF APPLICABLE AT ALL, *ILLINOIS BRICK CO. V. ILLINOIS*, 431 U.S. 720, *REHEARING DENIED*, 434 U.S. 881 (1977), PRESCRIBES ANTITRUST ACTION BROUGHT BY INDIRECT PURCHASERS EXCEPT IN TWO ADEQUATELY DEFINED AREAS 1) WHERE POTENTIAL PLAINTIFFS STATE CAUSES OF ACTION WHICH ARE FUNCTIONAL EQUIVALENTS TO A "COST-PLUS" CONTRACT AND 2) WHERE THE POTENTIAL DEFENDANT OWNS OR CONTROLS THE INTERVENING LINK IN THE CHAIN OF DISTRIBUTION WHICH "PASSED-ON" THE ALLEGED ILLEGAL OVERCHARGE. THE

QUESTION PRESENTED BY PETITIONERS IN THIS WRIT OF CERTIORARI IS WHETHER THIS COURT NEED REVIEW A DETERMINATION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FINDING PLAINTIFFS'-RESPONDENTS' ALLEGATIONS ARE A FUNCTIONAL EQUIVALENT TO A "COST-PLUS" CONTRACT.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

Plaintiffs-Respondents to this Petition for Writ of Certiorari by Petitioners, Safeway Stores, Inc., et al, have filed on June 27, 1980, their own Petition for Writ of Certiorari, No. 79-2060, styled *In re Beef Industry Antitrust Litigation*, M.D.L. Docket No. 248, A. L. Black v. Albertson's Inc. Respondents in the matter at hand petitioned for that writ based on the theory that *Hanover Shoe* and *Illinois Brick* are inapposite to the monopsonistic and oligopsonistic practices of the Petitioners here. Accordingly, this Court should find that *Hanover Shoe* and *Illinois Brick* do not apply, foregoing the need to address the issue raised by these Petitioners, Safeway Stores, Inc., et al., in this Petition.

Assuming *arguendo* applicability of the prescriptive and restrictive uses of the "pass-on" theory dictated by *Hanover Shoe* and *Illinois Brick* to the case at bar, Respondents here advocate in the alternative that the decision

below clearly and unmistakably found that Plaintiffs' complaints sufficiently allege situations which fall within the "cost-plus" exception to *Illinois Brick*.

Respondents here reserve the right to plead this cause in the alternative in this Petition without losing their right to plead the irrelevancy and inapplicability of *Hanover Shoe* and *Illinois Brick*.

STATEMENT OF THE CASE

This is an antitrust action brought by Plaintiffs-Respondents as fat cattle producers-sellers against Defendant-Petitioner supermarket chains and the supermarkets' trade association, for violation of §§1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2, seeking injunctive relief and treble damages for injury to Plaintiffs-Respondents' businesses and properties, 15 U.S.C. §15, 26. Such damages were the direct and proximate result of the Defendants'-Petitioners' unlawful conspiratorial actions to monopolize the beef industry resulting in the fixing and artificially depressing of the prices of fat cattle. Defendants'-Petitioners' monopsonistic and oligopsonistic practices, which violated the federal antitrust laws, deprived Plaintiffs-Respondents of a fair and reasonable price properly based upon the natural interaction of supply and demand in a free market system, a price which would have existed but for the anticompetitive, unlawful acts of the Defendants-Petitioners as alleged.

The Plaintiffs-Respondents filed this action on December 30, 1975, in the United States District Court for the Northern District of Texas, Amarillo Division. The Plaintiffs are individual and corporate cattle feeders, seven in number, all residents of Texas. They are engaged in the business of producing fattened cattle to be sold when ready for slaughter. The action originally named seventeen chain store defendants in the National Association of Food Chains. Settlements were made with four Defendants, leaving thirteen in the case. Defendants-Petitioners filed a Motion to Dismiss and for Judgment on the Pleadings under Rule 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure on June 17, 1977, predicated on the then recent decision of *Illinois Brick Co. v. Illinois, supra.*

The Trial Court entered its Order of Dismissal on the Rule 12(b) Motion, basing its reasoning on the holding of *Illinois Brick Co. v. Illinois, supra.* The District Court's Final Order, after Plaintiffs-Respondents had duly tendered amendments to their complaints, was entered December 9, 1977, dismissing with prejudice.

The Plaintiffs-Respondents duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit. On August 17, 1979, that Court entered judgment, reversing and remanding all the consolidated appealed cases to the United States District Court for the Northern District of Texas for further proceedings. *In Re Beef Antitrust Industry Litigation,* 600 F.2d 1148 (5th Cir. 1979). The mandate was stayed until July 9,

1980. The judgment agreed with the District Court that *Illinois Brick* applies to an indirect producer-seller, but held that a producer-seller forced to sell in a rigged market could maintain his civil antitrust action on a "functional equivalent" to a "cost-plus exception" to *Illinois Brick*.

REASONS FOR DENYING THE WRIT

I. This Case Should Be Reviewed By This Court, But Only Because The "Pass-On" Theory Espoused By This Court In *Hanover Shoe* And *Illinois Brick* Are Inapposite To The Monopsonistic And Oligopsonistic Practices Of Defendants-Petitioners.

This Court has recognized the seriousness of monopsony or oligopsony at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire market place is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal cur-

> rent of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." *Id.* at 542. (emphasis added)

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221.

Therefore, to violate the antitrust laws in this key position is not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick, supra*, but is instead an injury which permeates the entire market place, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221. In the present case, Plaintiffs have alleged that Defendants have conspired together to restrain trade in the entire market for the production, slaughter and purchase of beef. Defendants have chosen as their tool, for the manipulation of this market, the price they have agreed to pay for fresh frozen processed beef. Defendants, who existed in the key position of the market place, were therefore able to manipulate and rig

the entire market place by their conspiracy, a market into which Plaintiffs were forced to sell their live cattle which are a perishable commodity and in the short-term inelastic.

The Fifth Circuit, in the opinion below, stated:

> "The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated more broadly, is that the activities of the alleged price-fixing conspiracy depressed the wholesale prices generally . . ." *In Re: Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979)

Thus, the gravaman of Plaintiffs' complaints is that Plaintiffs are damaged, by the artificially depressed prices in the market into which they are compelled to sell a perishable fungible product.

The Fifth Circuit refused to recognize the distinction between a monopsony or an oligopsony which violates the antitrust laws in a dominant position of an industry's production chain, and that which was addressed by this Court in the *Illinois Brick* decision, where an overcharge was passed through several levels of distribution finally arriving at the ultimate consumer having been distorted by each level of distribution. The case presently before this Court is clearly not an "overcharge" case, but a case in which the Defendants chose price as their tool to manipulate an entire market in

which Plaintiffs participated, and in which Plaintiffs were damaged. Simply because the Defendants chose to use pricing as their tool does not mean that *Illinois Brick* is instantaneously invoked.

In interpreting *Illinois Brick*, the Third Circuit stated:

> "A different problem is presented where prices are fixed below the competitive market price or where Defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since Defendants' benefits in those instances are not so readily ascertainable and may not be sufficient to compensate 'those individuals whose protection is the primary purpose of the antitrust laws.' In such circumstances Courts have awarded damages based upon the amount of injury suffered by Plaintiffs rather than the benefits derived by the Defendants." *Midwest Paper Products v. Continental Group, Inc.*, 596 F.2d 573, 585 n. 47 (3rd Cir. 1979).

Here, such a "different problem" is presented in that Defendants used their position of dominance in the middle of the production chain of the market place in order to fix prices below competitive market prices, and thus effectively control the entire market place. Plaintiffs are simply seeking to recover those damages they have sustained because of such interference with the

free play of market forces, rather than trying to recoup any of the benefits which may have been derived by the Defendants.

The Fifth Circuit's Opinion below, states that this Court's decision in *Illinois Brick* is to have "general applications", including those cases in which price is used in order to monopolize a market in violation of Section 2 of the Sherman Act.

Surely this Court did not overrule *ub silentio* ninety years of antitrust law in practice in *Illinois Brick* nor did it intend for *Illinois Brick* to be applied to all Section 1 and 2 cases, regardless of their form, whenever pricing was involved. To hold thus, would be contrary to the prior rulings of this Court, the legislative intent of the Sherman and Clayton Acts, and discourage the enforcement of the antitrust laws which is contrary to this Court's holding in *Hanover Shoe v. United Shoe Machine Corp.*, 392 U.S. 481 (1968).

Since the announcement of the decision in *Illinois Brick* in 1977, the various courts throughout the United States have been groping with the decision in the context of ennumerable motions for summary judgment and motions under Rule 12(b) for dismissal for failure to state a cause of action.

The Third Circuit has held that they will apply *Illinois Brick* only in an overcharge situation, in which the illegal overcharge is passed through a chain of dis-

tribution. *Midwest Paper, supra.* This line of thinking has been followed by other Courts within that circuit, *Dart Drug Corp. v. Corning Glass Works,* 480 F.Supp. 1091 (D.C. Md. 1979), and in *In re Japanese Electronic Products Antitrust Litigation,* M.D.L. No. 189 (E.D. Pa. Opinion filed May 5, 1980). Both of these cases base their opinions, in large part, on Note 47 of *Midwest Paper Products, supra.* In *Dart Drug Corp.,* the Court states:

> "The foregoing review of the rationale of *Illinois Brick* makes it abundantly clear that the case bars suit *only* in those situations where Plaintiff's injury is premised on an 'overcharge' in where, in order to prove that injury, Plaintiff must also demonstrate that persons in the chain of distribution between Plaintiff and the antitrust violator passed on the overcharge to Plaintiff." *Dart Drug Corp.,* 480 F.Supp. at 1101. (emphasis added)

In *In re Japanese Electronic Products Antitrust Litigation, supra,* the Court declines to apply *Illinois Brick* where, "the amount of injury suffered by the Plaintiff rather than the benefits derived by the Defendants. . ." are the measure of damages, again citing Note 47 of *Midwest Paper Products.*

The Seventh Circuit in the case of *Fontana Aviation, Inc. v. Cessna Aircraft Company,* No. 79-1863 (7th Cir. Opinion filed March 19, 1980), refused to apply *Illinois Brick* where the defendant's pricing policy was alleged

to be part of a "multi-faceted conspiracy" causing competitive injury to the plaintiff. Here again, the plaintiff was suing for the damage he suffered by reason of the violation, rather than the disgorgemount of illegally obtained profits by the defendant. The plaintiff was only seeking to recover the amount of injury he had suffered as a proximate cause of the violation. *See, Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906).

In *In re Uranium Antitrust Litigation,* 473 F.Supp. 393 (N.D. Ill. 1979), the District Court again focuses on how Plaintiff was injured in determining whether or not to apply *Illinois Brick.* There the Court stated:

> "Counterclaimants fit within the class of '. . . those that have been injured by [alleged] restraints imposed by Defendant on competitive forces in the economy.' " *Id.* at 403.

The Fifth Circuit, although recognizing that Plaintiff's claim of damage to the market, and that Plaintiff's complaint further alleges that "(3) [Plaintiffs] sold their livestock for less than they would have in an open and competitive market", held that *Illinois Brick* was of such general application, that it applied to a case where the market was allegedly manipulated by use of price, and where the Defendants monopolized and attempted to monopolize said market by use of price. The Fifth Circuit's tortuous reasoning finally arrives at a point wherein they will allow Plaintiffs to continue their law-

suit, applying *Illinois Brick*, involving the "cost-plus" contract exception.

The Fifth Circuit further stated that it saw nothing "special about monopsony or oligopsony price fixing cases that justifies treating them [differently] from monopoly price-fixing cases . . ." . This statement is clearly at odds with the Third Circuit's opinion in *Midwest Paper* where it recognizes a difference between an undercharge and overcharge case. *Midwest Paper*, 596 F.2d at 585, n. 47.

Unless this Court addresses the issues raised in this case (especially in light of the Fifth Circuit's prophalactic application of *Illinois Brick*), there is a serious likelihood that there will be further divergence of the already multiple points of view regarding the scope and application of *Illinois Brick* within the Circuits, to the end that there will be non-uniform application of the antitrust laws within the United States.

II. If Applicable At All, The Decision Below Is An Unequivocally Consistent Interpretation Of The "Pass-On" Theory Espoused In This Court's Decisions in *Hanover Shoe* And *Illinois Brick*.

This Court has established definite guidelines for the handling of claims under the antitrust laws involving Section 4 of the Clayton Act, 15 U.S.C. §15: "Pass-on" claims or defenses are permitted in two well-defined

areas involving potential plaintiffs — causes of actions which state functional equivalents to a "cost-plus" contract and claims where the potential defendant owns or controls the intervening link in the chain of distribution which "passed-on" the alleged overcharge. *Illinois Brick, supra; Hanover Shoe Machinery Corp.*, 392 U.S. 481 (1968).

The Court's pronouncements in *Hanover Shoe* and *Illinois Brick* applied a uniform approach to the "passing-on" of an illegal overcharge from the illegal price-fixer through an intermediary to the ultimate consumer. *Hanover Shoe* refused to allow the "passing-on" of the illegal overcharge to the consumer as a defense attempting to show plaintiff incurred no damage under Section 4 of the Clayton Act, 15 U.S.C. §15; *Illinois Brick* prescribed plaintiffs' claim that the illegal overcharge was fully "passed-on" by the intermediary, causing plaintiff's damage under Section 4 of the Clayton Act. Policy reasons dictated such a response. Avoidance of multiple liability and duplicative recovery as well as the intricacies of economic analysis of numerous market factors necessitated the holdings of this Court. *Illinois Brick Co. v. Illinois*, 431 U.S. at 731-732, 738-741.

However, the Court emphatically stated that there are two situations in which the tracing of the illegal overcharge through this distribution chain is both easily and readily ascertainable: 1) the "cost-plus" contract exception and 2) the owned or controlled theory. *See, Illinois Brick Co. v. Illinois*, 431 U.S. at 736; *Hanover Shoe, Inc. v. United States Machinery Corp.*, 392 U.S. at 494.

In both instances, the policy grounds requiring strict application barring claims by remote purchasers dissipates, giving rise to easy proof of damages. Duplicative recoveries are avoided by use of evidence not susceptible to differing economic interpretation while economic intricacies are avoided by readily traceable evidence of the overcharge.

Undeniably, if application of *Hanover Shoe* and *Illinois Brick* are applicable, the Fifth Circuit was correct in finding that the Plaintiffs' allegations in their complaints were functional equivalents of the "cost-plus" contract exception. Each complaint sufficiently alleged on its face that from the price tendered by the food chains-defendants to the slaughterers and packers is subtracted a pre-determined amount derived from a consistent formula — a reverse "cost-plus" contract. Such contracts become pre-existing due to slaughterers and packers procuring Defendants' weekly requirements prior to their purchases from the Plaintiffs. Accordingly, the opinion of the Court below is a consistent interpretation of the principals espoused in this Court's decisions in *Hanover Shoe* and *Illinois Brick*.

III. The Decision Below Is In Conformity With Holdings Of Other Circuits And Of District Courts.

The Petitioners erroneously find fault through inconsistency with the decisions rendered in *Midwest Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573

(3rd Cir. 1979) and *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979) *cert. denied*, ____U.S. ____, 100 S.Ct. 1021 (1980). Petitioners correctly state the holdings of each case, but fail to explain their respective rationale.

The Third Circuit in *Midwest Paper, supra*, denied indirect purchasers of consumer bags the right to maintain treble damage actions unless it could be found that there was pre-existing, fixed quantity, cost-plus contracts. 596 F.2d at 578. On the basis of documents before it, the Court could not find evidence that such contracts existed. Evidence did support a finding of "informal oral arrangements;" *Id.* at 580. Such arrangements were not reduced to formal contracts for a fixed quantity as alleged by the Plaintiffs-Respondents. The Third Circuit merely refused to find what the Fifth Circuit in the opinion below could not deny — a finding of a pre-existing "cost-plus" contract.

The Fourth Circuit failed to find a "cost-plus" exception to *Illinois Brick* where gasoline wholesalers attempted to assert a defensive "pass-on" theory to plaintiff-retailers allegation of conspiracy to fix wholesale prices. Again, the "cost-plus" exception was not applied due to the Court's finding that "no cost-plus arrangement insured that this immutable ratio would apply even in the absence of a conspiracy. Indeed, a free market surely would and did disrupt it." The Court was unwilling to expand the established requirements of *Hanover Shoe* which the Fifth Circuit found present in the case at hand.

The Sixth Circuit affirmed a District Court's finding of allowing use of the "cost-plus" exception as a defense in a claim where the plaintiff, distributor of mesh window bags, charged its customers the price affixed by the defendant plus a fixed 5%. *Obron v. Union Camp Corp.*, 355 F.Supp. 902 (E.D.Mich. 1972) *aff'd* 477 F.2d 542 (6th Cir. 1973). Finding that the Court in *Hanover Shoe* did not scrap the use of "passing-on" but rather restricted its application, the District Court held that if this was not a "pre-existing" "cost-plus" contract, it was "so strikingly similar to such a contract as to dictate the allowance on the 'passing-on' defense." 355 F.Supp. at 906. The case at hand is analytically akin to *Obron*, in that the slaughterers and packers secured orders from the Defendant food chains to fill their weekly requirements prior to negotiating with Plaintiffs, making bids based on those order prices minus a pre-determined, consistently applied pricing formula.

The holdings of these Courts were based not on a restrictive interpretation of *Hanover Shoe* and *Illinois Brick*, but rather focused on a failure of proof to sustain an application of the "cost-plus" exception. The Fifth Circuit in the opinion below found enough support to determine that the complaints as alleged sufficiently stated a cause of action within the "cost-plus" contract exception. The Circuits therefore have not addressed efforts, and consequently could not reject efforts, to expand the "cost-plus" contract rationale in an attempt to authorize other types of "pass-on" situations. Rather, the Third and Fourth Circuits have not been

satisfied that plaintiffs sufficiently supported their claims to justify invocation of the "cost-plus" contract exception while the Sixth Circuit gave due deference to this Court's opinions.

CONCLUSION

The situation presented by the Plaintiffs-Respondents emphatically falls outside the scope of this Court's rulings in *Hanover Shoe* and *Illinois Brick*. Assuming *arguendo* that this Court's decision in those cases are applicable, the Fifth Circuit's decision applying to "cost-plus" exception is undisputably well found. For these reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, Respondents respectfully request that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 79-1920, upon all Plaintiffs' Counsel of record and Defendants' Counsel of record in these proceedings contained within the most recent Liaison Counsel and attorneys list.

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No. 79-1920

IN THE

Supreme Court of the United States

October Term, 1979

SAFEWAY STORES, INC., *et al.*,

Petitioners,

vs.

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,

Respondents.

BRIEF OF RESPONDENT-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Does the decision of the United States Supreme Court in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 *rehearing denied,* 434 U.S. 881 (1977) so narrowly limit the application of Section 4 of the Clayton Act, 15 U.S.C. §15, that the primary producers of fat cattle, as *sellers* of a fungible commodity to packers and slaughterers for an artificially depressed price, are precluded from recovering damages arising from sales into an inelastic market which is allegedly rigged by the supermarkets, the supermarkets' trade association, a beef-commodity reporting service and other unnamed co-conspirators in violation of the federal antitrust laws?

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1920

SAFEWAY STORES, INC., *et al.*,

Petitioners,

vs.

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,

Respondents.

BRIEF OF RESPONDENT-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent-plaintiffs, fat cattle producers and feeders, respectfully pray that this Court deny the Petition of Safeway Stores, Inc., *et al.* for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and grant only respondents' (Meat Price Investigators Association *et al.*, and Ronald Becker, *et al.*) Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 79-1959.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

INTRODUCTION

Respondent-plaintiffs to this Petition for a Writ of Certiorari by these petitioners, Safeway Stores, Inc., *et al.*, filed their own Petition for a Writ of Certiorari, No. 79-1959, captioned *In re Beef Industry Antitrust Litigation*, M.D.L. No. 248, *Meat Price Investigators Association, et al. vs. Safeway Stores, Inc., et al.* and *Ronald Becker, et al. vs. Safeway Stores, Inc., et al.* Respondent-plaintiffs petitioned in No. 79-1959 for a writ on the grounds that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (hereinafter referred to as *Hanover Shoe*) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977) (hereinafter referred to as *Illinois Brick*) do not bar the *primary sellers* of a fungible commodity from recovering damages for the losses sustained as a direct result of sales into a market that has allegedly been rigged by the supermarkets, the supermarkets' trade association, a beef-commodity reporting service and other unnamed co-conspirators.

Assuming *arguendo* that the use of the "pass-on theory of damages" as announced in *Hanover Shoe* and *Illinois Brick* is held to be applicable to primary sellers into a conspiratorially rigged market, the respondents herein advocate, in the alternative, that the Court of Appeals for the Fifth Circuit correctly held that the present cause falls within those actions which are excepted from *Illinois Brick*.

Respondents here reserve the right to plead this cause in the alternative in this Petition without losing their right to plead the inapplicability of *Hanover Shoe* and *Illinois Brick* to the fact situation existing in these causes of action.

STATEMENT OF THE CASE

The causes of action involved in this Petition are antitrust actions brought by fat cattle producers and feeders, respondent-plaintiffs herein, against numerous large supermarket chains, the supermarkets' trade association (formerly known as the National Association of Food Chains and now known as the Food Marketing Institute), a beef-commodity reporting service (known as the National Provisioner, Inc., publisher of The National Provisioner Daily Market and News Service, which is commonly known as the "Yellow Sheet"), petitioner-defendants herein, and other unnamed co-conspirators. The complaints allege that the concerted activities of these defendants, together with the activities of the unnamed co-conspirators, violate the provisions of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1-2), and damaged the plaintiffs (respondents herein) by artificially depressing the fair market price for fat cattle.[1] Paragraphs 25-34 of the Amended and Substituted Complaints in *MPIA* and *Becker*, Appendix ("App.") at A-13—A-18 and A-39—A-41.

The complaints, as amended, are brought by the respondent-plaintiffs for damages and for injunctive relief, under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

---

[1] The agricultural census figures compiled by the U.S. Department of Agriculture for the early 1970's indicate that approximately 81% of all fat cattle is marketed in the United States in 11 of these states by approximately 20% of the producers of fat cattle.

On June 17, 1977, petitioner-defendants filed Motions for dismissal and for Judgment on the Pleadings under Rules 12(b)(6) and 12 (c) of the Federal Rules of Civil Procedure predicated primarily upon the decision in *Illinois Brick*. The Trial Court entered its Order of Dismissal on the Rule 12(b) Motion, basing its reasoning on the policy decision enunciated in *Illinois Brick*. The District Court's Final Order was entered December 9, 1977, dismissing these actions with prejudice. App. A-1.

The plaintiffs appealed, in a timely fashion, to the United States Circuit Court of Appeals for the Fifth Circuit. On August 17, 1979, that Court entered judgment, reversing and remanding all the consolidated appealed cases to the District Court for the Northern District of Texas for further proceedings. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). The mandate was stayed until July 9, 1980. The Circuit Court:

(1) agreed with the District Court that the policy decision announced in *Illinois Brick* applies to an indirect producer-seller, but held that a producer-seller forced to sell into a rigged market could maintain a civil antitrust action on a "functional equivalent" to a "cost-plus exception" to *Illinois Brick*;

(2) affirmed the District Court's holding that the Amended and Substituted Complaints failed to allege a co-conspiracy between supermarkets, the chain stores, the supermarkets' trade association and a beef-commodity reporting service, and the packers and slaughterers; and

(3) held that the District Court did not err in sustaining defendants' Rule 12(b) Motion to Dismiss with Prejudice and in denying plaintiffs' request for leave to amend under Rule 15, Federal Rules of Civil Procedure.

REASONS WHY THIS PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. The Policy Decision Announced in *Illinois Brick* Applies Only to Direct Purchasers Who Have Been Penalized by an Overcharge.

The petitioner-defendants over-generalize the holdings of the United States Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977) by attempt to broadly apply the holdings of those cases to sellers (Pet. at 2) and by their bold assertion that "'pass-on claims' or defenses are not permitted" (Pet. at 5). *Hanover Shoe* held, *inter alia*, that a manufacturer could not assert a "pass-on theory of damages" defense against a direct *purchaser* who *paid* an *overcharge*. *Illinois Brick* held, *inter alia*, that an indirect *purchaser* could not use a "pass-on theory of damages" offensively to recover *overcharges paid*.

Respondent-plaintiffs' complaints allege, however, that respondent-plaintiffs are damaged, not by the *payment* of *overcharges*, but by the inadequate price that they received because the *market was artificially depressed* through the activities of the petitioner-defendants, and other unnamed co-conspirators, in violation of the federal antitrust laws. Neither *Hanover Shoe* nor *Illinois Brick* deals with—or even refers to—*first sellers* of fungible commodities into a *conspiratorially rigged market* for an *artificially depressed* price. *See Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978).[2]

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[2] In response to plaintiffs' characterization of the holding if *Illinois Brick* as "the direct purchaser of a price-fixed product is the only proper party to recover for the overcharges on that product," the District Court stated:

II. These Causes of Action Pose No Apportionment of Damages Problems Among Various Levels of the Market.

The respondent-plaintiffs' causes of action do not present the problems of proof or of administrative complexity that are addressed in *Hanover Shoe* and *Illinois Brick*.

The Amended and Substituted Complaints allege that plaintiffs have suffered, among other things, a "[l]oss of revenues measured by the difference between the artificially depressed price received by plaintiffs . . . and the price they would have received had free market conditions existed." App. at A-23. Because there is no allegation of an overcharge to the middlemen by defendant supermarkets, there is no opportunity for defendants to assert a pass-on of damages defense. Indeed, should there be an assertion of the "pass-on of damages theory" by the named defendants in this cause, said defendants would place themselves in the astounding posture of defending the action by asserting that they did not pay adequate consideration for their supplies of beef.

These causes of action pose no apportionment problem because no *overcharge* has been *paid*. The allegations of the Amended and Substituted Complaint assert an artificially depressed market price for fat cattle. Amended and Substituted Complaint, paragraph 34, App. at A-16. In contrast, the problem addressed by this Court in *Illinois Brick* is what might be termed a "trickle down" problem—a problem of tracing the overcharge to and overpayment by a direct purchaser

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> Closely examined, the proposition proves too much. It would immunize from antitrust liability any manufacturer who conspired with his suppliers to fix the price of the supplied raw material. *Illinois Brick* does not mention, let alone discuss, such a situation.

Id. at 443.

through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the *payment* of the overcharge might be absorbed by the payor. In this action, however, there is no "trickle down". The cattlemen, who are selling their perishable product at a conspiratorially depressed price into an artificially depressed market which, in short term is inelastic, can neither recoup or pass-on any loss they suffer nor make up that loss by passing on an overcharge because they are the *first sellers* into the rigged market. Therefore, any apportionment of damages will be only among the *first sellers into* the conspiratorially depressed market—not, as in *Illinois Brick*, among successive levels of the market itself.

III. The Injury Alleged in These Causes of Action Arises Out of the Conspiratorial Depression of the Price of Fat Cattle in the General Market.

The Court of Appeals accurately recognized:

> The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979).

The respondent-plaintiffs are damaged because the free market forces have been superseded by the illegal activities of the petitioner-defendants and the other unnamed co-conspirators.[3] Indeed, the respondent-plaintiffs are damaged because the general market for their fungible commodity is illegally depressed—not because they paid an overcharge to a middleman.

This Court has recognized the seriousness of monopsony or oligopsony power at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire marketplace is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. *Id.* at 542. Emphasis added.

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[3] *See Reiter v. Sonotone Corp.*, Trade Reg. Rep. (CCH) ¶63,212 (1980) *appeal denied* Misc. No. 80-8058 (8th Cir. May 23, 1980) ("When the manufacturers and retailers conspire to fix the prices . . . such competition is foreclosed and the market is no longer competitive. Such price-fixing activities by manufacturers and retailers is a per se violation of Section 1 of the Sherman Act." and further "Because the purchaser, including the plaintiff herein . . . is paying the overcharge directly, no assertion that an overcharge has been passed on to it from another injured party will be necessary to prove the alleged damages.")

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221.

Therefore, a violation of the antitrust laws by those persons who stand in this key position in the market creates not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick*, but creates an injury which permeates the entire market, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221. In the present cause, plaintiffs have alleged that defendants have conspired to restrain trade in the entire market for the production, slaughter and purchase of fat cattle. Defendants have chosen as their tool for the manipulation of this market, the price they have agreed to pay for fresh processed carcass beef produced from fat cattle. Defendants, who occupy a key position in the market, were therefore able to manipulate and to conspiratorially rig the entire market which is inelastic in the short-term and into which plaintiffs were forced to sell their live fat cattle.

While recognizing that plaintiffs claim damage to the market in general and that "(3) [plaintiffs] sold their livestock for less than they would have in the open and competitive market," the Fifth Circuit Court of Appeals held that *Illinois Brick* was of such general application that it applied to circumstances where the market was allegedly manipulated by use of price and where the defendants monopolized and attempted to monopolize said market by use of illegal pricing

practices. The purpose of the federal antitrust laws is to regulate and protect competition. *Mandeville Is. Farms v. American C. S. Co.*, 334 U.S. 219, 243 (1947); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). Surely this Court did not intend *Illinois Brick* to thwart the Congressional scheme of regulation and protection by barring recovery of damages by those persons injured in their business or property where the free market forces are conspiratorially and illegally controlled through the use of illegally depressed pricing.

IV. As the First Sellers Into the General Market, the Respondent-Plaintiffs Will Ensure the Vigorous Enforcement of the Federal Antitrust Laws.

In *Illinois Brick*, the Supreme Court determined that, as a matter of policy, the protection of competition through the vigorous enforcement of the federal antitrust laws is best served if only direct *purchasers* are allowed to recover treble damages for *overcharges paid* by those purchasers. The quality and quantity of the interest of the plaintiffs in these causes of action differ, however, from those of the plaintiffs in an *Illinois Brick* context. In a cause of action to recover overcharges paid by purchasers, the potential plaintiffs are an amorphous mass of ultimate consumers whose members may have made as little as one purchase of an overpriced product. In contrast, these plaintiffs are an identifiable group of primary producers who earn their livelihood through the sale of their fungible commodity into the general market. The damages suffered by the primary producers in the present cause are not caused by an individualized injury; their damages arise from the demise of a free and competitive market where price is illegally depressed. Because these plaintiffs

are primary sellers into this market, they have a continuing interest in ensuring that the market remains free and competitive through the vigorous enforcement of the federal antitrust laws.

CONCLUSION

For each of the foregoing reasons, respondent-plaintiffs respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

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Dated: August 20, 1980.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court has caused to be served the within Brief of Respondent-Plaintiffs in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendices thereto upon all Plaintiffs Counsel of record and upon all Defendants Counsel of record in these proceedings contained within the most recent Liaison Counsel and attorneys list.

Respectfully submitted,

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Dated: August 20, 1980.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:
BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee) 6
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA 3-76-1254-C (Petersen)
CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

ORDER

The Court in its letter of October 19, 1977, informed the parties in the above causes that it would strike the retail price fixing allegations of the plaintiffs and dismiss plaintiffs' complaints on the basis of *Illinois Brick Co. v. Illinois*, —— U.S. ——, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S., Oct. 3, 1977) (No. 76-404).

It is therefore ORDERED that the allegations listed in Appendix A to this Order are dismissed and stricken from such complaints.

It is further ORDERED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

United States District Judge

Dec. 9, 1977

APPENDIX A

PLAINTIFFS' RETAIL PRICE-FIXING ALLOCATIONS

Petersen (CA 3-76-1254-C)

Amended Complaint, Section IV, Paragraph 2(b)-(d)

Pony Creek (CA 3-75-0702-C)

Third Amended Complaint, Paragraph 12(b)

MPIA (CA 3-76-1238-C)

Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)

Agee (CA 3-76-1237-C)

Amended Complaint, Section IV, Paragraphs 2(b)-(d)

Black (CA 3-76-1238-C)

Amended Complaint, Paragraphs 42b, 45b(2), 45b(4), 52, 72 and 74

Chaparral (CA 3-76-1253-C)

Complaint, Section V, Paragraphs 2(b) and 2(d)

Boccardo (CA 3-76-1255-C)
Amended Complaint, Paragraphs 57(b) and 57(d)
Becker (CA 3-76-1261-C)
Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)
Varian (CA 3-76-1470-C)
Complaint, Section III, Paragraphs 15 and 24; and Section V, Paragraphs 2(b), 2(d) and 3
Becker-DC (CA 3-77-0360-C)
Complaint, Paragraph 25(b)
MPIA-DC (CA 3-77-0361-C)
Complaint, Paragraph 23(b)

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MEAT PRICE INVESTIGATORS ASSOCIATION, an Iowa unincorporated association and trust, LAVERN E. RESCHKE, DARREL KLEPPE, DEAN JACKSON, JOE MENTE, CLARENCE VOS, LYNN SHERIFF, WAYNE MEIER, DON REILLY, BILL ENO, GAY HATLE, BOB SEVERTSON, CLEM SCHROEDER, FLOYD EDGINGTON, JR., GLENN FREIE, ALLAN BERTRAM, and BYRON HAYES, Individually and as Members of the Board of Trustees of Meat Price Investigators Association; RESCHKE BROTHERS, an Illinois partnership; JACKSON FARMS, an Iowa partnership; IDLEWILD FARMS, an Iowa partnership; ENO FARMS, INC., an Iowa corporation; EDNA FEEDLOT, A Kansas partnership; and HAYES CATTLE, INC., a Missouri corporation,

Plaintiffs,

v.

SAFEWAY STORES, INCORPORATED, a Maryland Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland Corporation; THE KROGER CO., an Ohio Corporation; AMERICAN STORES COMPANY f/k/a ACME MARKETS, INC., a Delaware Corporation; LUCKY STORES, INC., a California Corporation; JEWEL COMPANIES, INC., a New York Corporation; WINN-DIXIE STORES, INC., a Florida Corporation; FOOD FAIR, INC., f/k/a FOOD FAIR STORES, INC., a Pennsylvania Corporation; GRAND UNION CO., a Delaware Corporation; SUPERMARKETS GENERAL CORP., a Delaware Corporation; NATIONAL TEA COMPANY, an Illinois Corporation; STOP & SHOP COMPANIES, INC., a Massachusetts Corporation; FIRST NATIONAL STORES, INC., a Massachusetts Corporation; COLONIAL STORES, INC., A Virginia Corporation; ALLIED SUPERMARKETS, INC., a Delaware Corporation; GIANT FOOD, INC., a Delaware Corporation; BORMAN'S, INC., a Delaware Corporation; PUEBLO INTERNATIONAL, INC., a Delaware Corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, now, as a result of merger, known as FOOD MARKETING INSTITUTE; and NATIONAL PROVISIONER, INCORPORATED, a New York Corporation,

Defendants.

CIVIL NO. 75-333-2
In Re: Beef Industry Antitrust Litigation
M.D.L. No. 248
No. CA 3-76-1238-C
(N.D.Tex.)

AMENDED AND SUBSTITUTED COMPLAINT

Plaintiffs, as assignees and trustees of the members of Meat Price Investigators Association, by their attorneys, bring this civil action against the above-named defendants for treble the amount of damages suffered by them by reason of defendants' violation of the antitrust laws of the United States and for injunctive relief and demanding a trial by jury, complaint against the defendants and each of them, and allege as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1980 (26 Stat. 209), as amended (15 U.S.C. §§ 1 and 2) commonly known as the Sherman Act. This action is brought by the plaintiffs and each of them, for the members, now and hereafter, of Meat Price Investigators Association, an Iowa unincorporated association and trust, for three-fold the damages suffered by them, including reasonable attorneys fees, and for injunctive relief, under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

2. Each of the defendants or its agents or co-conspirators maintains offices, transacts business, or is found within the Southern District of Iowa, and is within the jurisdiction of this Court for the purpose of services of process. Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Southern District of Iowa. The interstate trade and commerce described hereinafter is carried on in part, within the Southern District of Iowa.

II.
PARTIES

PLAINTIFFS

3. The plaintiff, Meat Price Investigators Association (hereinafter "MPIA"), acting through its Board of Trustees, is an unincorporated association and an express trust organized and created in the Southern District of Iowa under the laws of Iowa for the purpose of, among other things, investigating and prosecuting this instant action. Meat Price Investigators Association presently has in excess of 450 members, all of whom have assigned their individual causes of action against these defendants to Meat Price Investigators Association, have given Meat Price Investigators Association a power of attorney in fact, and created an express trust in Meat Price Investigators Association and in its Board of Trustees as trustees, to prosecute this instant action for the individual and collective benefit and on behalf of the Association and its members. The members of Meat Price Investigators Association have fed approximately 350,000 head of cattle per year during the period of which complaint is made herein. The interests of each of the members of Meat Price Investigators Association are coincident with and not antagonistic to those of other members of the Association. The claims of each of the members involve common questions of law and fact, including *inter alia* the issues raised by the defendants' acts in violation of §§ 1 and 2 of the Sherman Act as hereinafter alleged. Claims and defenses of each of the members of Meat Price Investigators Association are typical of the claims and defenses of all members of Meat Price Investigators Association. Meat Price Investigators Association has the fiduciary duties of a trusteee under Iowa law pursuant to the power of

attorney in fact given and the express trust created by each of the members, and as such, Meat Price Investigators Association will fairly and adequately represent and protect the interests of each of its members. The members of Meat Price Investigators Association include individual proprietorships, partnerships and corporations who have raised and fed cattle during the years 1963 to present, all of whom can be identified by their membership in the plaintiff, Meat Price Investigators Association. The members reside in the states of Iowa, Illinois, Minnesota, Missouri, Nebraska, Indiana, Colorado, South Dakota, Montana, Wyoming, Idaho, Kansas, Utah and California.

4. Members of the Board of Trustees of Meat Price Investigators Association and representative plaintiffs in this cause of action are Lavern E. Reschke, doing business in a partnership called Reschke Brothers from Geneseo, Illinois; Darrel Kleppe, of Clinton, Iowa; Dean Jackson of Kellerton, Iowa, doing business in a partnership called Jackson Farms; Joe Mente of Wheatland, Iowa; Clarence Vos of Kingsley, Iowa, doing business in a partnership known as Idlewild Farms; Lynn Sheriff of Sheffield, Iowa, individually and as a partner in a dissolved partnership known as Idlewild Farms; Lynn Sheriff of Sheffield, Iowa, individually and as a partner in a dissolved partnership known as Sheriff Feed and Livestock; Wayne Meier of Hubbard, Iowa; Don Reilly of LeMars, Iowa; Bill Eno of Sheffield, Iowa, a shareholder in Eno Farms, Inc.; Gay Hatle of Meadow, South Dakota; Bob Severtson of Havre, Montana; Clem Schroeder of New Providence, Iowa; Glenn Freie of Latimer, Iowa; Floyd Edgington, Jr., of Sheffield, Iowa, doing business as an individual proprietorship in Iowa and in a Kansas partnership known as Edna Feedlot; and Allan Bertram of Ireton, Iowa;

and Byron Hayes, of Chillicothe, Missouri, doing business as a shareholder in Hayes Cattle, Inc., a Missouri corporation. Each of the above-named representative plaintiffs are and have been cattle raisers during all times material to this lawsuit.

DEFENDANTS

5. The defendant SAFEWAY STORES, INCORPORATED (hereinafter "Safeway") is a Maryland corporation with its principal office in Oakland, California. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States, with more than 2400 stores, concentrated primarily west of the Mississippi River and also in the Washington, D. C. area. Safeway buys beef at wholesale and sells beef at retail.

6. The defendant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. (hereinafter "A&P") is a Maryland corporation with its principal office in Montvale, New Jersey. A&P and its subsidiaries operate the second largest chain of retail food stores in the United States, with more than 2,000 stores, concentrated east of the Mississippi River. A&P buys beef at wholesale and sells beef at retail.

7. The defendant THE KROGER CO. (hereinafter "Kroger") is an Ohio corporation with its principal office in Cincinnati, Ohio. Kroger and its subsidiaries operate the third largest chain of retail food stores in the United States, with more than 1,200 stores, concentrated in the mid-Atlantic, mid-Western and sourthern regions of the United States. Kroger buys beef at wholesale and sells beef at retail.

8. The defendant AMERICAN STORES COMPANY, formerly Acme Markets, Inc. (hereinafter "American Stores") is a Delaware corporation with principal offices in Wilmington, Delaware. American Stores and its subsidiaries

operate 787 retail food stores in the United States, with Acme Markets stores concentrated in the mid-Atlantic states and Alpha Beta stores concentrated in Arizona and California. These stores buy beef at wholesale and sell beef at retail. American Stores runs beef slaughtering and packing facilities which purchase cattle and supply virtually all requirements of American Stores' retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

9. The defendant LUCKY STORES, INC. (hereinafter "Lucky") is a California corporation with its principal offices in Dublin, California. Lucky and its subsidiaries operate approximately 400 retail food stores in the United States, with Lucky and Food Basket stores concentrated in California and the Western states and Eagle stores concentrated in the mid-West and Texas. Lucky purchases beef at wholesale and sells beef at retail.

10. The defendant JEWEL COMPANIES, INC. (hereinafter "Jewel") is a New York corporation with principal offices in Chicago, Illinois. Jewel and its subsidiaries operate approximately 400 retail food stores in the United States, with approximately 300 Jewel and Eisner stores concentrated in the Chicago area, approximately 60 Star stores concentrated in New England and 40 Buttrey stores concentrated in the Northwest. Jewel purchases beef at wholesale and sells beef at retail.

11. The defendant WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie") is a Florida corporation with its principal offices in Jacksonville, Florida. Winn-Dixie and its subsidiaries operate approximately 1,000 retail food stores under the names Winn-Dixie and Kwik-Chek, which are concentrated in the Southeastern United States. Winn-Dixie purchases beef

at wholesale and sells beef at retail. Winn-Dixie also runs beef slaughtering and packing plants which purchase live cattle and supply and sell beef at wholesale.

12. The defendant FOOD FAIR, INC., formerly Food Fair Stores, Inc. (hereinafter "Food Fair"), is a Pennsylvania corporation with principal offices in Philadelphia, Pennsylvania. Food Fair and its subsidiaries operate approximately 450 retail food stores concentrated in the eastern seaboard area of the United States and particularly concentrated in Florida and Pennsylvania. Food Fair buys beef at wholesale and sells beef at retail. Food Fair also operates beef slaughtering and packing plants which purchase cattle and supply virtually all of requirements of Food Fair's retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

13. The defendant GRAND UNION CO. (hereinafter "Grand Union") is a Delaware corporation with principal offices in Elmwood Park, New Jersey. Grand Union and its subsidiaries operate approximately 500 retail food stores concentrated along the eastern seaboard area of the United States and concentrated particularly in New York and New Jersey. Grand Union purchases beef at wholesale and sells beef at retail.

14. The defendant SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General") is a Delaware corporation with principal offices in Woodbridge, New Jersey. Supermarkets General operates over 100 supermarket-drugstore retail outlets under the name "Pathmark," which are concentrated in the mid-Atlantic region of the United States. Supermarkets General purchases beef at wholesale and sells beef at retail.

15. The defendant NATIONAL TEA COMPANY (hereinafter "National Tea") is an Illinois corporation with principal offices in Rosemont, Illinois. National Tea and its subsidiaries operate more than 450 retail food stores in the United States, concentrated primarily in the midwest and south central United States. National Tea buys beef at wholesale and sells beef at retail.

16. The defendant STOP & SHOP COMPANIES, INC. (hereinafter "Stop & Shop") is a Massachusetts corporation with principal offices in Boston, Massachusetts. Stop & Shop and its subsidiaries operate over 300 retail food stores concentrated in the New England area of the United States. Stop & Shop buys beef at wholesale and sells beef at retail.

17. The defendant FIRST NATIONAL STORES, INC. (hereinafter "First National") is a Massachusetts corporation with principal offices in Somerville, Massachusetts. First National and its subsidiaries operate over 260 retail food stores, concentrated primarily in the New England area of the United States and in New York and New Jersey under the name Finast. First National buys beef at wholesale and sells beef at retail.

18. The defendant COLONIAL STORES, INC. (hereinafter "Colonial") is a Virginia corporation with principal offices in Atlanta, Georgia. Colonial and its subsidiaries operate over 375 retail food stores concentrated in the southeastern part of the United States. Colonial buys beef at wholesale and sells beef at retail.

19. The defendant ALLIED SUPERMARKETS, INC. (hereinafter "Allied") is a Delaware corporation with principal offices in Livonia, Michigan. Allied and its subsidiaries operate approximately 250 retail food stores concentrated in

the midwestern United States and particularly in Michigan and Ohio. Allied buys beef at wholesale and sells beef at retail.

20. The defendant GIANT FOOD, INC. (hereinafter "Giant") is a Delaware corporation with principal offices in Landover, Maryland. Giant and its subsidiaries operate over 100 retail food stores concentrated in the Washington, D.C. area. Giant buys beef at wholesale and sells beef at retail.

21. The defendant BORMAN'S, INC. (hereinafter "Borman's") is a Delaware corporation with principal offices in Detroit, Michigan. Borman's and its subsidiaries operate over 80 retail food stores concentrated in the Detroit, Michigan, area. Borman's buys beef at wholesale and sells beef at retail.

22. The defendant PUEBLO INTERNATIONAL, INC. (hereinafter "Pueblo") is a Delaware corporation with principal offices in New York, New York. Pueblo and its subsidiaries operate approximately 100 retail food stores concentrated under the name Pueblo in Puerto Rico and under the name Hills in New York City. Pueblo buys beef at wholesale and sells beef at retail.

23. The defendant NATIONAL ASSOCIATION OF FOOD CHAINS, now as a result of merger known as FOOD MARKETING INSTITUTE (hereinafter "NAFC"), has principal offices located in Washington, D. C., and Chicago, Illinois. NAFC is a trade organization whose members are the largest retail food chains in the United States; small food companies and independents were formerly not eligible for membership. The retail food chains that comprise the membership of the NAFC are the largest purchasers of carcass beef in the United States. The NAFC recently has merged with the Supermarket Institute and is now known as Food Marketing Institute.

24. The defendant NATIONAL PROVISIONER, INCORPORATED (hereinafter "National Provisioner") is a New York corporation with principal offices in Chicago, Illinois. The National Provisioner publishes market advisory services, including The National Provisioner Daily Market and News Service or "Yellow Sheet" which lists the prices for beef during various time periods.

III.

CO-CONSPIRATORS

25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.

IV.

NATURE OF TRADE AND COMMERCE

26. Cattle are raised and fed on farms, ranches and feedlots such as those operated by the plaintiffs and members of MPIA. Some cattlemen purchase calves from others for fattening, while other cattlemen fatten cattle they have raised from birth. Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle.

27. Cattlemen must make irrevocable decisions concerning the supply of cattle between six and 18 months prior to the time that the animal will be marketed. These decisions are known to packers and defendant chain stores and other co-conspirators through reports made by the United States Department of Agriculture and others. Inasmuch as the cattle-

man's decision to raise and feed cattle must be made from six to 18 months in advance of sale, he cannot pass on or recoup from his suppliers any damages or loss resulting from his sale of cattle. A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short term is known throughout the industry and is inelastic.

28. The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis for the price given plaintiffs and members of MPIA by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or "Yellow Sheet" for all transactions east of the Rocky Mountains and some transactions west of the Rocky Mountains, and for other transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

29. Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. The live cattle are reduced by the slaughterers and packers to carcass beef, beef primals and beef sub-primals prior to sale. Some edible beef is sold by slaughterers and packers as hanging beef, while other beef is vacuum-packed and sold by packers as boxed beef.

30. A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains.

31. A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is designed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle.

32. The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers, and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef.

33. Approximately 80 per cent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendant chain stores to the cattlemen.

34. At dates unknown to the plaintiffs, including some believed to be prior to 1963, the defendants and other co-conspirator chain stores combined and conspired to employ monopolistic-monopsonistic and other non-competitive methods in the purchase and marketing of beef to the detriment of cattlemen, and particularly the plaintiffs and the members of MPIA. Among the overt manifestations of these combinations, agreements and attempts to monopolize, are the following:

a. Many retail food chains, including the defendant food chains named herein and other co-conspirators, have engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof, from one or more central locations.

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied among the different defendant food chains and other co-conspirators in instances where the defendant food chains have had retail marketing outlets in the same marketing area, or in instances where the various different defendant food chains have been buying from the

same packer or slaughterer sources, thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas of the United States so that retail outlets of the defendants compete with one another in increasingly fewer instances. Over the years, defendants and other co-conspirators have increasingly engaged in the practice of concentrating more intensively in the various marketing areas in which they have been dominant for the purpose of eliminating competition, attempting to monopolize and establishing market dominance.

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale. Instead they have agreed that A&P and Safeway, and other defendants and co-conspirators at other times and places, will establish the wholesale price and the remaining defendants and co-conspirators will utilize the Yellow Sheet or "Safeway price." This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle.

e. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in the pricing of beef at retail. Instead, they have agreed to establish uniform margins or spreads between the wholesale and retail price of the various beef cuts. Further, the defendant food chains and other co-conspirators have agreed upon uniform advertising policies and the uniform raising and lowering of retail beef prices for the designed purpose of manipulating and influencing the consumer demand for beef. Through uniform entry into the wholesale beef market or uni-

form withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price," and which prices are directly passed on to the beef producer.

f. By combining to utilize their superior marketing power, the defendant food chains and other co-conspirators have developed extensive warehousing facilities and have utilized vacuum-packaging as a device to store beef for an extended period of time, permitting said chains and other co-conspirators to uniformly withdraw from the wholesale beef market for the purpose of artificially lessening the demand for newly slaughtered beef and cattle, thus directly and artificially lowering the price for cattle. Through combination and the use of monopoly power and knowledge, this warehousing and use of vacuum-packaging has been used by the defendant chain stores and other co-conspirators as a lever to depress the price of beef, to break price rallies, and to depress the beef prices to an artificially low level.

34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

35. During the period of time covered by this Complaint, defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf-producing states into Iowa, including the Southern District of Iowa, and other states. Most livestock slaughtering plants are located near the areas of livestock production and feeding, a major area of which is Iowa, including the Southern District of Iowa. Beef carcasses and parts thereof from the slaughterhouses and meat packers move by truck and railroad in interstate commerce from and through Iowa, including the Southern District of Iowa, and other states to surrounding states and into all areas of the United States. The defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous movement of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen, and processed beef.

V.

OFFENSES CHARGED

36. Beginning at a date unknown to the plaintiffs, but at least as early as 1963, and continuing up to the date of this Amended and Substituted Complaint, the defendants and coconspirators, through meetings arranged and conducted by defendant, National Association of Food Chains (now as a result of merger known as Food Marketing Institute), and by other means, have engaged and are now engaged in an unlawful combination and conspiracy and unreasonable restraint of

the aforesaid trade and commerce in cattle and fresh and processed beef and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

37. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize and the monopolization and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plan, agreement and concert of action by and among the defendants and their co-conspirators, the substantial terms, purposes and intent of which have been to:

a. Fix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, which artificially low prices are directly passed through to cattlemen and are not absorbed in whole or in part by packers and slaughterers, because of the utilization of the device of formula pricing to cattlemen based upon the Yellow Sheet, and on the west coast, the "Safeway price."

b. Utilize market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef, by charging non-competitive and artificially high prices for fresh and processed beef sold at retail to consumers, thus artificially depressing the true demand for beef and manipulating, controlling and depressing the price of cattle.

c. Allocate geographic territories among themselves to eliminate competition among themselves and other co-conspirators in the purchase and sale of beef and to increase market

concentration and dominance in given areas, to increase the wholesale-retail price spread of beef, and thus cause the price of wholesale slaughtered beef and cattle to drop to artificially low levels.

d. Specify different quality, yield and trim standards for wholesale slaughtered beef in instances where the defendants have retail stores in the same geographic area, or where the defendants buy wholesale beef from the same packer and slaughterer sources, for the purpose of eliminating competition among themselves and artificially depressing demand and price for cattle.

e. Eliminate competition for fresh and processed beef by employing a system whereby A&P and Safeway, and other co-conspirators at other times and places, set prices on an agreed-upon and understood time of the week, which prices are followed by all other defendant retail food chains and other co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast.

f. Eliminate price competition for fresh and processed beef by means of manipulation of the "Yellow Sheet" published by the defendant, National Provisioner, for the purpose of communicating beef prices and calculating beef prices, with knowledge that the "Yellow Sheet" price is utilized by all major beef packers and slaughterers as a device to directly pass on to cattlemen the artificially low price set by the defendant food chains and other co-conspirators.

g. Utilize the National Association of Food Chains and others to develop and effectuate the aforesaid price-fixing conspiracy and attempt to monopolize.

VI.

FRAUDULENT CONCEALMENT

38. The defendants and co-conspirators repeatedly fraudulently concealed the existence of their combination and conspiracy and attempt to monopolize by various means used to avoid the detection thereof, including express denials on the public record under oath, of meeting together to discuss meat pricing, and as a result of such concealment the plaintiffs and members of MPIA and each of them had no knowledge and could not by the exercise of reasonable diligence have obtained the knowledge of the existence of the combination and conspiracy and attempt to monopolize until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the defendant co-conspirators did indeed meet together to discuss the pricing of beef.

39. By virtue of this fraudulent concealment, plaintiffs and members of MPIA and each of them, assert the tolling of the applicable statute or period of limitations affecting plaintiffs' rights to action herein.

VII.

INJURY TO PLAINTIFFS

40. As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinbefore alleged, plaintiffs and members of MPIA have suffered injury to their business and property as follows:

a. Loss of and reduction in value of their respective businesses;

b. Loss and decrease in revenues and profits which would have otherwise been earned;

c. Incurrence of additional expenses which would otherwise have been avoided by the increased economies lost due to

the inhibition and limitation on expansion caused by depressed prices.

d. Loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the members of MPIA and the price they would have received had free market conditions existed.

41. The precise extent of the aforesaid damages are not presently known, and plaintiffs hereby pray leave of Court to amend this Complaint when said amount has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. Plaintiffs and members of MPIA and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States;

3. Plaintiffs, on behalf of members of MPIA and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) from the defendants who are jointly and severally liable therefor;

4. Plaintiffs and the members of MPIA, and each of them, recover the costs of suit together with attorneys' fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15);

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. § 26);

6. Plaintiffs and the members of MPIA be awarded such other and further relief as this Court may deem just and proper.

Dated this 16th day of August, 1977.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:
BEEF INDUSTRY ANTITRUST LITIGATION

THIS MATTER PERTAINS TO:
MEAT PRICE INVESTIGATORS ASSOCIATION, ET AL.,
Plaintiffs,

vs.

SAFEWAY STORES, INC., ET AL.,
Defendants.

MDL DOCKET NO. 248
DOCKET NO. CA 3-76-1238-C

JURY DEMAND

COME NOW the plaintiffs in the above-entitled cause and hereby demand a trial by jury of the issues stated in the Complaint.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD BECKER, EUGENE VANDER HAMM, FRANCIS STECHER, DEAN STECHER, and JAMES R. GLANN, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

SAFEWAY STORES, INCORPORATED, a Maryland Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland Corporation; THE KROGER CO., an Ohio Corporation; AMERICAN STORES COMPANY f/k/a ACME MARKETS, INC., a Delaware Corporation; LUCKY STORES, INC., a California Corporation; JEWEL COMPANIES, INC., a New York Corporation; WINN-DIXIE STORES, INC., a Florida Corporation; FOOD FAIR, INC., f/k/a FOOD FAIR STORES, INC., a Pennsylvania Corporation; GRAND UNION CO., a Delaware Corporation; SUPERMARKETS GENERAL CORP., a Delaware Corporation; NATIONAL TEA COMPANY, an Illinois Corporation; STOP & SHOP COMPANIES, INC., a Massachusetts Corporation; FIRST NATIONAL STORES, INC., a Massachusetts Corporation; COLONIAL STORES, INC., a Virginia Corporation; ALLIED SUPERMARKETS, INC., a Delaware Corporation; GIANT FOOD, INC., a Delaware Corporation; BORMAN'S INC., a Delaware Corporation; PUEBLO INTERNATIONAL INC., a Delaware Corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, now, as a result of merger, known as FOOD MARKETING INSTITUTE; and NATIONAL PROVISIONER, INCORPORATED, a New York Corporation,

Defendants.

CIVIL NO. 76-251-1
In re: Beef Industry Antitrust Litigation
M.D.L. No. 248
No. CA 3-76-1361-C
(N.D.Tex.)

AMENDED AND SUBSTITUTED COMPLAINT
(Class Action)
JURY TRIAL DEMAND

Plaintiffs, by and through their attorneys, bring this civil action against the above-named defendants and each of them, on behalf of themselves and all other persons, firms, corporations or other entities similarly situated for treble the amount of damages suffered by them by reason of the defendants' violation of the antitrust laws of the United States and for injunctive relief, and demanding a trial by jury, complain against defendants, and each of them, and allege as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1890 (26 Stat. 209), as amended (15 U.S.C. §§ 1 and 2) commonly known as the Sherman Act. This action is brought by the plaintiffs and each of them, and for members of the class they represent for threefold the damages suffered by them including reasonable attorneys fees, and for injunctive relief under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

2. Each of the defendants or its agents or co-conspirators maintains offices, transacts business, or is found within the Southern District of Iowa, and is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Southern District of Iowa. The interstate trade and commerce described hereinafter is carried on, in part, within the Southern District of Iowa.

II.

CLASS ACTION

3. This Complaint is properly maintainable as a class action under the provisions of Federal Rules of Civil Procedure 23(a) and 23(b)(3) as follows:

a. The class consists of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and each person who has in the period in question sold more than 100 head of fat cattle per annum, with the exception that the plaintiffs named in the following enumerated lawsuits presently on file in the various district courts of the United States are not a part of this class:

(1) *Peterson, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-0984-RFP (N.D.Cal., filed May 16, 1975);

(2) *Pony Creek Cattle Company, Inc., et al. v. The Great Atlantic & Pacific Tea Company, et al.*, Civil No. CA 3-75-0702-C (N.D.Tex. [Dallas Division] filed June 3, 1975);

(3) *Lowe, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-4043 (N.D.Iowa, filed July 29, 1975);

(4) *Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-333-2 (S.D.Iowa, filed December 1, 1975);

(5) *Agee, et al. v. Safeway Stores, Inc., et al.*, Civil No. R-75-224-BRT (D.Nev., filed December 5, 1975);

(6) *Black, et al. v. Acme Markets, Inc., et al.*, Civil No. CA 2-75-186 (N.D. Tex. [Amarillo Division] filed December 30, 1975);

(7) *Chaparral Cattle Corp., et al. v. Safeway Stores, Inc., et al.*, Civil No. C-76-79 (D.Utah [Central Division], filed March 15, 1976);

(8) *James F. Boccardo and Boccardo Cattle Company v. Safeway Stores, Inc., et al.*, Civil No. C-76-600-OJC (N.D.Cal., filed March 24, 1976).

b. Plaintiffs are members of said class; their claims are typical of the claims of the members of said class.

c. Plaintiffs believe that the members of said class are so numerous as to make joinder impracticable, the exact number and identification of the class being unknown to plaintiffs, but on information plaintiffs believe that the class would consist of approximately 36,000 fat cattle producers or feeders.

d. The claims of the class involve common questions of both fact and law. Some common questions of fact include whether the defendants participated in a combination and conspiracy to fix, artificially maintain, stabilize or lower the selling price of choice beef or its equivalent purchased by them during the period in question, thus directly lowering the selling price for fat cattle; whether the defendants utilized market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef; whether the defendants agreed to al-

locate geographic territories among themselves and to increase their market concentration and dominance in given areas; whether the defendants have agreed to specify different quality, yield and trim standards for wholesale slaughtered beef; whether the defendants have combined and conspired and attempted to monopolize for the purpose of eliminating competition for fresh, frozen and processed beef by employing a system of agreed-upon price leadership, which prices are followed by other defendants and co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast; whether the defendants have combined and conspired and attempted to monopolize for the purpose of eliminating price competition for slaughtered beef by means of manipulation of the "Yellow Sheet;" and whether the defendants have monopolized, attempted to monopolize and combined to monopolize important areas of beef purchasing, and cattle purchasing, which has directly affected and controlled the price of live cattle. Some common questions of law include whether the actions alleged constitute violations of §§ 1 and 2 of the Sherman Act and thereby create liability of the defendants to the class.

e. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

f. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

g. Plaintiffs will adequately represent the interests of the class.

III.
PARTIES

PLAINTIFFS

4. Plaintiffs, Ronald Becker, Ireton, Iowa; Eugene Vander Hamm, Ireton, Iowa; Francis Stecher, Stockton, Iowa; Dean Stecher, Stockton, Iowa; and James R. Glann, Oklahoma City, Oklahoma, are and have been at all times material hereto raisers and feeders of fat cattle for ultimate slaughter.

DEFENDANTS

5. The defendant SAFEWAY STORES, INCORPORATED (hereinafter "Safeway") is a Maryland corporation with its principal office in Oakland, California. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States, with more than 2400 stores, concentrated primarily west of the Mississippi River and also in the Washington, D. C. area. Safeway buys beef at wholesale and sells beef at retail.

6. The defendant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. (hereinafter "A&P") is a Maryland corporation with its principal office in Montvale, New Jersey. A&P and its subsidiaries operate the second largest chain of retail food stores in the United States, with more than 2,000 stores, concentrated east of the Mississippi River. A&P buys beef at wholesale and sells beef at retail.

7. The defendant THE KROGER CO. (hereinafter "Kroger") is an Ohio corporation with its principal office in Cincinnati, Ohio. Kroger and its subsidiaries operate the third largest chain of retail food stores in the United States, with more than 1,200 stores, concentrated in the mid-Atlantic, mid-Western and sourthern regions of the United States. Kroger buys beef at wholesale and sells beef at retail.

8. The defendant AMERICAN STORES COMPANY, formerly Acme Markets, Inc. (hereinafter "American Stores") is a Delaware corporation with principal offices in Wilmington, Delaware. American Stores and its subsidiaries

operate 787 retail food stores in the United States, with Acme Markets stores concentrated in the mid-Atlantic states and Alpha Beta stores concentrated in Arizona and California. These stores buy beef at wholesale and sell beef at retail. American Stores runs beef slaughtering and packing facilities which purchase cattle and supply virtually all requirements of American Stores' retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

9. The defendant LUCKY STORES, INC. (hereinafter "Lucky") is a California corporation with its principal offices in Dublin, California. Lucky and its subsidiaries operate approximately 400 retail food stores in the United States, with Lucky and Food Basket stores concentrated in California and the Western states and Eagle stores concentrated in the mid-West and Texas. Lucky purchases beef at wholesale and sells beef at retail.

10. The defendant JEWEL COMPANIES, INC. (hereinafter "Jewel") is a New York corporation with principal offices in Chicago, Illinois. Jewel and its subsidiaries operate approximately 400 retail food stores in the United States, with approximately 300 Jewel and Eisner stores concentrated in the Chicago area, approximately 60 Star stores concentrated in New England and 40 Buttrey stores concentrated in the Northwest. Jewel purchases beef at wholesale and sells beef at retail.

11. The defendant WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie") is a Florida corporation with its principal offices in Jacksonville, Florida. Winn-Dixie and its subsidiaries operate approximately 1,000 retail food stores under the names Winn-Dixie and Kwik-Chek, which are concentrated in the Southeastern United States. Winn-Dixie purchases beef

at wholesale and sells beef at retail. Winn-Dixie also runs beef slaughtering and packing plants which purchase live cattle and supply and sell beef at wholesale.

12. The defendant FOOD FAIR, INC., formerly Food Fair Stores, Inc. (hereinafter "Food Fair"), is a Pennsylvania corporation with principal offices in Philadelphia, Pennsylvania. Food Fair and its subsidiaries operate approximately 450 retail food stores concentrated in the eastern seaboard area of the United States and particularly concentrated in Florida and Pennsylvania. Food Fair buys beef at wholesale and sells beef at retail. Food Fair also operates beef slaughtering and packing plants which purchase cattle and supply virtually all of requirements of Food Fair's retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

13. The defendant GRAND UNION CO. (hereinafter "Grand Union") is a Delaware corporation with principal offices in Elmwood Park, New Jersey. Grand Union and its subsidiaries operate approximately 500 retail food stores concentrated along the eastern seaboard area of the United States and concentrated particularly in New York and New Jersey. Grand Union purchases beef at wholesale and sells beef at retail.

14. The defendant SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General") is a Delaware corporation with principal offices in Woodbridge, New Jersey. Supermarkets General operates over 100 supermarket-drugstore retail outlets under the name "Pathmark," which are concentrated in the mid-Atlantic region of the United States. Supermarkets General purchases beef at wholesale and sells beef at retail.

15. The defendant NATIONAL TEA COMPANY (hereinafter "National Tea") is an Illinois corporation with principal offices in Rosemont, Illinois. National Tea and its subsidiaries operate more than 450 retail food stores in the United States, concentrated primarily in the midwest and south central United States. National Tea buys beef at wholesale and sells beef at retail.

16. The defendant STOP & SHOP COMPANIES, INC. (hereinafter "Stop & Shop") is a Massachusetts corporation with principal offices in Boston, Massachusetts. Stop & Shop and its subsidiaries operate over 300 retail food stores concentrated in the New England area of the United States. Stop & Shop buys beef at wholesale and sells beef at retail.

17. The defendant FIRST NATIONAL STORES, INC. (hereinafter "First National") is a Massachusetts corporation with principal offices in Somerville, Massachusetts. First National and its subsidiaries operate over 260 retail food stores, concentrated primarily in the New England area of the United States and in New York and New Jersey under the name Finast. First National buys beef at wholesale and sells beef at retail.

18. The defendant COLONIAL STORES, INC. (hereinafter "Colonial") is a Virginia corporation with principal offices in Atlanta, Georgia. Colonial and its subsidiaries operate over 375 retail food stores concentrated in the southeastern part of the United States. Colonial buys beef at wholesale and sells beef at retail.

19. The defendant ALLIED SUPERMARKETS, INC. (hereinafter "Allied") is a Delaware corporation with principal offices in Livonia, Michigan. Allied and its subsidiaries operate approximately 250 retail food stores concentrated in

the midwestern United States and particularly in Michigan and Ohio. Allied buys beef at wholesale and sells beef at retail.

20. The defendant GIANT FOOD, INC. (hereinafter "Giant") is a Delaware corporation with principal offices in Landover, Maryland. Giant and its subsidiaries operate over 100 retail food stores concentrated in the Washington, D.C. area. Giant buys beef at wholesale and sells beef at retail.

21. The defendant BORMAN'S, INC. (hereinafter "Borman's") is a Delaware corporation with principal offices in Detroit, Michigan. Borman's and its subsidiaries operate over 80 retail food stores concentrated in the Detroit, Michigan, area. Borman's buys beef at wholesale and sells beef at retail.

22. The defendant PUEBLO INTERNATIONAL, INC. (hereinafter "Pueblo") is a Delaware corporation with principal offices in New York, New York. Pueblo and its subsidiaries operate approximately 100 retail food stores concentrated under the name Pueblo in Puerto Rico and under the name Hills in New York City. Pueblo buys beef at wholesale and sells beef at retail.

23. The defendant NATIONAL ASSOCIATION OF FOOD CHAINS, now as a result of merger known as FOOD MARKETING INSTITUTE (hereinafter "NAFC"), has principal offices located in Washington, D. C., and Chicago, Illinois. NAFC is a trade organization whose members are the largest retail food chains in the United States; small food companies and independents were formerly not eligible for membership. The retail food chains that comprise the membership of the NAFC are the largest purchasers of carcass beef in the United States. The NAFC recently has merged with the Supermarket Institute and is now known as Food Marketing Institute.

24. The defendant NATIONAL PROVISIONER, INCORPORATED (hereinafter "National Provisioner") is a New York corporation with principal offices in Chicago, Illinois. The National Provisioner publishes market advisory services, including The National Provisioner Daily Market and News Service or "Yellow Sheet" which lists the prices for beef during various time periods.

IV.

CO-CONSPIRATORS

25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.

V.

NATURE OF TRADE AND COMMERCE

26. Cattle are raised and fed on farms, ranches and feedlots such as those operated by the plaintiffs and members of MPIA. Some cattlemen purchase calves from others for fattening, while other cattlemen fatten cattle they have raised from birth. Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle.

27. Cattlemen must make irrevocable decisions concerning the supply of cattle between six and 18 months prior to the time that the animal will be marketed. These decisions are known to packers and defendant chain stores and other co-conspirators through reports made by the United States Department of Agriculture and others. Inasmuch as the cattle-

man's decision to raise and feed cattle must be made from six to 18 months in advance of sale, he cannot pass on or recoup from his suppliers any damages or loss resulting from his sale of cattle. A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short term is known throughout the industry and is inelastic.

28. The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis for the price given plaintiffs and members of MPIA by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or "Yellow Sheet" for all transactions east of the Rocky Mountains and some transactions west of the Rocky Mountains, and for other transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

29. Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. The live cattle are reduced by the slaughterers and packers to carcass beef, beef primals and beef sub-primals prior to sale. Some edible beef is sold by slaughterers and packers as hanging beef, while other beef is vacuum-packed and sold by packers as boxed beef.

30. A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains.

31. A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is designed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle.

32. The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers, and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef.

33. Approximately 80 per cent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendant chain stores to the cattlemen.

34. At dates unknown to the plaintiffs, including some believed to be prior to 1963, the defendants and other co-conspirator chain stores combined and conspired to employ monopolistic-monopsonistic and other non-competitive methods in the purchase and marketing of beef to the detriment of cattlemen, and particularly the plaintiffs and the members of MPIA. Among the overt manifestations of these combinations, agreements and attempts to monopolize, are the following:

a. Many retail food chains, including the defendant food chains named herein and other co-conspirators, have engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof, from one or more central locations.

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied among the different defendant food chains and other co-conspirators in instances where the defendant food chains have had retail marketing outlets in the same marketing area, or in instances where the various different defendant food chains have been buying from the

same packer or slaughterer sources, thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas of the United States so that retail outlets of the defendants compete with one another in increasingly fewer instances. Over the years, defendants and other co-conspirators have increasingly engaged in the practice of concentrating more intensively in the various marketing areas in which they have been dominant for the purpose of eliminating competition, attempting to monopolize and establishing market dominance.

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale. Instead they have agreed that A&P and Safeway, and other defendants and co-conspirators at other times and places, will establish the wholesale price and the remaining defendants and co-conspirators will utilize the Yellow Sheet or "Safeway price." This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle.

e. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in the pricing of beef at retail. Instead, they have agreed to establish uniform margins or spreads between the wholesale and retail price of the various beef cuts. Further, the defendant food chains and other co-conspirators have agreed upon uniform advertising policies and the uniform raising and lowering of retail beef prices for the designed purpose of manipulating and influencing the consumer demand for beef. Through uniform entry into the wholesale beef market or uni-

form withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price," and which prices are directly passed on to the beef producer.

f. By combining to utilize their superior marketing power, the defendant food chains and other co-conspirators have developed extensive warehousing facilities and have utilized vacuum-packaging as a device to store beef for an extended period of time, permitting said chains and other co-conspirators to uniformly withdraw from the wholesale beef market for the purpose of artificially lessening the demand for newly slaughtered beef and cattle, thus directly and artificially lowering the price for cattle. Through combination and the use of monopoly power and knowledge, this warehousing and use of vacuum-packaging has been used by the defendant chain stores and other co-conspirators as a lever to depress the price of beef, to break price rallies, and to depress the beef prices to an artificially low level.

34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

35. During the period of time covered by this Complaint, defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf-producing states into Iowa, including the Southern District of Iowa, and other states. Most livestock slaughtering plants are located near the areas of livestock production and feeding, a major area of which is Iowa, including the Southern District of Iowa. Beef carcasses and parts thereof from the slaughterhouses and meat packers move by truck and railroad in interstate commerce from and through Iowa, including the Southern District of Iowa, and other states to surrounding states and into all areas of the United States. The defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous movement of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen, and processed beef.

VI.

OFFENSES CHARGED

36. Beginning at a date unknown to the plaintiffs, but at least as early as 1963, and continuing up to the date of this Amended and Substituted Complaint, the defendants and coconspirators, through meetings arranged and conducted by defendant, National Association of Food Chains (now as a result of merger known as Food Marketing Institute), and by other means, have engaged and are now engaged in an unlawful combination and conspiracy and unreasonable restraint of

the aforesaid trade and commerce in cattle and fresh and processed beef and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

37. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize and the monopolization and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plan, agreement and concert of action by and among the defendants and their co-conspirators, the substantial terms, purposes and intent of which have been to:

a. Fix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, which artificially low prices are directly passed through to cattlemen and are not absorbed in whole or in part by packers and slaughterers, because of the utilization of the device of formula pricing to cattlemen based upon the Yellow Sheet, and on the west coast, the "Safeway price."

b. Utilize market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef, by charging non-competitive and artificially high prices for fresh and processed beef sold at retail to consumers, thus artificially depressing the true demand for beef and manipulating, controlling and depressing the price of cattle.

c. Allocate geographic territories among themselves to eliminate competition among themselves and other co-conspirators in the purchase and sale of beef and to increase market

concentration and dominance in given areas, to increase the wholesale-retail price spread of beef, and thus cause the price of wholesale slaughtered beef and cattle to drop to artificially low levels.

d. Specify different quality, yield and trim standards for wholesale slaughtered beef in instances where the defendants have retail stores in the same geographic area, or where the defendants buy wholesale beef from the same packer and slaughterer sources, for the purpose of eliminating competition among themselves and artificially depressing demand and price for cattle.

e. Eliminate competition for fresh and processed beef by employing a system whereby A&P and Safeway, and other co-conspirators at other times and places, set prices on an agreed-upon and understood time of the week, which prices are followed by all other defendant retail food chains and other co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast.

f. Eliminate price competition for fresh and processed beef by means of manipulation of the "Yellow Sheet" published by the defendant, National Provisioner, for the purpose of communicating beef prices and calculating beef prices, with knowledge that the "Yellow Sheet" price is utilized by all major beef packers and slaughterers as a device to directly pass on to cattlemen the artificially low price set by the defendant food chains and other co-conspirators.

g. Utilize the National Association of Food Chains and others to develop and effectuate the aforesaid price-fixing conspiracy and attempt to monopolize.

VII.

FRAUDULENT CONCEALMENT

38. The defendants and co-conspirators repeatedly fraudulently concealed the existence of their combination and conspiracy and attempt to monopolize by various means used to avoid the detection thereof, including express denials on the public record under oath, of meeting together to discuss meat pricing, and as a result of such concealment the plaintiffs and members of MPIA and each of them had no knowledge and could not by the exercise of reasonable diligence have obtained the knowledge of the existence of the combination and conspiracy and attempt to monopolize until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the defendant co-conspirators did indeed meet together to discuss the pricing of beef.

39. By virtue of this fraudulent concealment, plaintiffs and members of MPIA and each of them, assert the tolling of the applicable statute or period of limitations affecting plaintiffs' rights to action herein.

VIII.

INJURY TO PLAINTIFFS

40. As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinbefore alleged, plaintiffs and members of MPIA have suffered injury to their business and property as follows:

a. Loss of and reduction in value of their respective businesses;

b. Loss and decrease in revenues and profits which would have otherwise been earned;

c. Incurrence of additional expenses which would otherwise have been avoided by the increased economies lost due to

the inhibition and limitation on expansion caused by depressed prices.

d. Loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the members of MPIA and the price they would have received had free market conditions existed.

41. The precise extent of the aforesaid damages are not presently known, and plaintiffs hereby pray leave of Court to amend this Complaint when said amount has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. Plaintiffs and members of MPIA and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States;

3. Plaintiffs, on behalf of members of MPIA and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) from the defendants who are jointly and severally liable therefor;

4. Plaintiffs and the members of MPIA, and each of them, recover the costs of suit together with attorneys' fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15);

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. § 26);

6. Plaintiffs and the members of MPIA be awarded such other and further relief as this Court may deem just and proper.

Dated this 16th day of August, 1977.

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